Parsons Law:

Or, A View of

ADVOWSONS.

WHEREIN

Is contained the Rights of the Patrons, Ordinaries and Incumbents, to Advowsons of Churches, and Benefices with Cure of Souls, and other Spiritual Promotions.

Collected out of the whole Body of the Common-Law, and some Late REPORTS.

By *William Hughes* of *Grayes-Inne*, Esquire.

Whereunto is added an

APPENDIX,

CONTAINING

The Heads of the several STATUTES made in the Reigns of King CHARLES the First, and King CHARLES the Second, touching the same Points; which was never before Printed.

LONDON,

Printed by John Streater, Henry Twyford, and Elizabeth Flesher, Assigns of Richard Atkins and Edward Atkins, Esquires. 1673.

Cum Gratia & Privilegio Regiæ Majestatis.

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14 Dec. 29 - Cl.

Law 8N29 Carswell

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To all the Reverend Clergy of the Kingdom of England.

Reverend Sirs,

THIS Little Treatise (called *Parsons Law*, or *A View of Advowsons*) A *Compendium* of the Rights, Titles, and Interests of Patrons, Ordinaries and Incumbents to Ecclesiastical Dignities, Spiritual Promotions, Churches, and Benefices with Cure, was first written by me, at the earnest request of some Eminent men of the Clergy, in *An. Dom.* 1634. to whom I delivered several Manuscript Copies thereof, (as also to many other Honourable and Worthy Persons) for their private use. In *An.* 1636. the Tenth year of the Reign of the late King

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Charles the First over *England*, *&c.* (of blessed memory,) I delivered a perfect Manuscript Copy of it to the Right Honourable, the then Lord Chief Justice of his Majesties Court of Kings-Bench, to overview it, and have his Approbation of it; who (finding it so much to concern the Church and Church-men in their Temporals,) recommended it to the Right Reverend Father in God, *William* then Lord Archbishop of *Canterbury*; who likewise perused it, and Transmitted it to some Learned Doctors of the Canon and Civil Laws, to consider whether there was any thing in that Manuscript, which might be prejudicial to the Church: Those Doctors kept it some time in their hands, but at length returned it to the said Archbishop of *Canterbury* his Grace, together with their signification, That what was written in that Treatise, was for the Benefit and Advantage of the whole Clergy in general, and no ways against the Laws or Liberties of the Church: Whereupon his Grace returned it to the said Lord Chief Justice; And his said Lordship there-

thereupon, not only gave his Licence, but laid his Command upon me, for the Imprinting and Publishing of it for the publick good. It lay afterwards by me for some time: But in *Anno* 1641. (at the Importunity of some Friends) it was first Imprinted for the Author; and published: And it found good Acceptance of, and from the whole Clergy.

In the time of the Long Parliament, and the late unhappy War, and differences between the said late Kings Majesty and his Parliament and People, (notwithstanding that by Power and Prevalency (without the King) the Dignities of Bishops, Deans and Chapters, and other Spiritual Promotions, and their Lands, Possessions & Rights, were usurped upon, and illegally taken away by an Ordinance of Parliament only; Nay, although that afterwards, *viz.* in the time of the Usurped Powers over the people of this Nation, it was endeavoured to take away the whole Maintenance and Livelyhood of the Ministry, by the abolishing of Tythes, the chiefest

part of their Subsistence: Yet (in the heighth of all these Illegal Transactions) this Little Treatise stood still on foot; was not called in, or forbidden, or so much as opposed, or ever questioned, it having received such a Worthy and Legal Approbation as aforesaid.

Since the most happy and rightfull Restoration of his most Excellent the Kings Majesty that now is, to his Imperial Crown and Dignity over the Kingdom of *England*, and his other Dominions: as also of the restoring Bishops, Deans and Chapters, and other Spirituall persons to their Prime, Original, and Legal Spiritual Livings, Dignities, Promotions and Incumbencies, and to their Rights and Interests of, in, and to the same, I have been again requested by some Reverend Divines, to review my first Work, and to add what I should think fit and requisite for the further Illustration and Confirmation of their former Rights and Interests; which I have done, adding here and there, (as occasion did arise) several Cases taken out of the late

late Reports of ſome Reverend Judges, and other approved Authors for the ſame purpoſe. I hope I may ſay of this Little Treatiſe, (without oſtentation) that it is *Magnum in parvo*; it being a Legal Comprehenſive of all the Rights and Intereſts of the perſons before mentioned: inſomuch (as I humbly conceive) there is ſcarce any doubt or queſtion which may hereafter ariſe concerning the ſame, or any of them, which may not receive a cleer Reſolution from ſome Caſes herein, or by a Legal and juſt Conſequence deduced from them.

The firſt Edition I publiſhed without any Epiſtle Dedicatory. I conſidered with my ſelf, to whom I ſhould offer, and preſent this Second Edition; I could not think of any perſons, as to you the Reverend Clergy of this Kingdom, for whoſe ſakes and uſes it was firſt Written and undertaken: To you therefore I commend it, and commit it, not doubting of your favourable Acceptance of theſe my weak Endeavours therein; And hoping that it may ſome way tend to the leſſening of Suits in Law, ſetling of Peace between you and o-

thers concerning your Rights and In
terests in Temporals, and also redow
to the publick good of the whole Na
tion, which is the desire of him, wh
is

From my Study in Grayes-Inn, December. 19. 1662.

Your Well wishing
Friend, ever to b
Commanded,

William Hughes

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Parsons Lavv,

OR, A View of Advowsons.

CHAP. I.

Of Archbishops and Bishops, and of their Election, Confirmation, Consecration, and Investure; And when their Temporalities shall be delivered unto them.

AN Archbishop is a Spiritual person Secular, who hath Jurisdiction in all Causes and things which are Ecclesiastical, in a Province within the Realm whereof he is the Archbishop.

In the Realm, of *England* there are but two Provinces, *viz.* *Canterbury* and *York*; the Archbishop of *Canterbury* *Vid.* Matth. Parker, Antiquit. Brit. fo. 111.

Ranulph. Ciſtren. lib. 2. cap. 57. 16. Eliz. Dyer, 327.

bury is at this day ſtiled, *Metrapolitanus & Primas totius Angliæ*; The Archbiſhop of *York*, is *Primas, & Metrapolitanus Angliæ*.

Cook 1. part, Inſtitut. 94. Matthew Parker Antiquit. Britan. 20.

Each of theſe Archbiſhops hath in his Province ſuffragan Biſhops of the ſeveral Provinces; The Archbiſhop of *Canterbury* hath under him within his Province, *Rocheſter* his Principal Chaplain, *London* his Dean, *Wincheſter* his Chancellour, *Norwich*, *Lincoln*, *Ely*, *Chicheſter*, *Salisbury*, *Exeter*, *Bath* and *Wells*, *Worceſter*, *Coventry* and *Lichfield*, *Hereford*, *Landaffe*, St. *Davids*, *Bangor* and St. *Aſaph*, *Glouceſter*, *Briſtol*, *Peterborrow* and *Oxford*.

The Archbiſhop of *York* hath under him, within his Province, The Biſhop of the County Palatine of *Cheſter*, erected and annexed by King *Henry* the 8. to his Province; The Biſhop of the County Palatine of *Durham*; The Biſhop of *Carlile*, and of the *Iſle of man* annexed alſo to his Province by King *Henry* the 8.

The Archbiſhop of *Canterbury* hath the Predency of all the Clergy within the Realm of *England*, and is ranked before all the Nobility of the

the Realm, *viz.* next and immediately after the Kings Children, Brothers, *&c.* And in all antient Charters, Statutes, and Acts of Parliaments, the Bishops were ever named before the Temporal Lords; as appeareth by the Statutes of *Magna Charta*, and *Charta de Forresta*; *Henricus Dei gratia*, &c. *Archiepiscopis*, *Episcopis*, *Comitibus*, *Baronibus*, &c. and by other Statutes.

All the Archbishopricks and Bishopricks within the Realm of *England* were of Kings Foundations, and the Kings of *England* were the Founders of them all: At the first they were Donative, *per traditionem Baculi Pastoralis*, *& annuli*; Which was a Symbol of a Spiritual Marriage betwixt them and the Church: But afterward King *John*, by his Charter 15. *Januarii*, *Anno Regni sui* 17. *De communi consensu Baronum*, granted, That they should be ever after *Elegible*; And after that time came in the *Conge de Eslier*.

Vid Cook 5. part 14. in Cawdries case. *Vid.* Stat. 1. Jac. cap. 3. 17. E. 3. 40.

In Antient time by the Common Law, the Founders and Patrons of Churches and Benefices, had a full and an absolute inheritance in them,

Vid. Cook. 1. part, Institut. 344.

Br. tit Presentment al Eglise 41. 6 H. 7 14. 19. E. 3. tit. Qu. Imp. 60. Seldom tit. Dism. cap. 6. fo. 91.

and upon every vacancy might have conferred them upon Incumbents, without Admission, Institution and Induction of the Bishop by Livery, or delivering unto them the ring of the Church door: And the Investure of Bishops (as before is said) were only *per Annulum, & Baculum*; But by General Councils, afterwards, the Right not only of Investure, but of Institution and Induction of Incumbents of Churches were transferred to Bishops and others.

Bishops hold their Temporal Possessions of their Bishopricks *per Baroniam*, as appeareth *Ex Rott. Patent. de anno* 18. *Hen* 3. *Membr.* 17. viz. *Mandatum est omnibus Episcopis qui Conventuri sunt apud Glouceſtriam die Sabath. in Craſtin. Stæ Katherinæ, firmiter inhibendo, Quod ſicut Baronias ſuas, quas de Rege Tenent, diligunt, nullo modo preſumant Concilium tenere de aliquibus quæ ad Coronam Regis pertinent, vel quæ perſonam Regis, vel ſtatum ſuum, vel ſtatum Concilii ſui contingunt: Scituri pro certo, quod ſi defecerint, Rex inde ſe Capiat ad Baronias ſuas.* And they sit in Parliaments as Barons, by reason of their Temporal possessions.

Rott. Par. 18. H. 3. Membr. 17.

Vid. 7. H. 8. Kellaway 184. in Dr. Standishes case.

The

The Dioceſs of every Archbiſhop and Biſhop, is divided into Archdeaconries, according to the extent of the Biſhoprick: Whereof ſome are by Preſcription, as the Archdeaconry of *Richmond* is; Some are *de jure* by the Law, and ſome are by Covenant and Contract made between the Biſhop and the Archdeacon. When the Archdeacon hath his Juriſdiction by Covenant, or Contract, the ſame does not take away the Juriſdiction of the Biſhop; as the ſame doth, where the Archdeaconry is holden by Preſcription, or *de jure*: For if the Biſhop doth hold plea, or doth intermeddle with any thing within the Juriſdiction of the Archdeaconry by Covenant or Contract, the Archdeacon can only have an Action of Covenant againſt the Biſhop: But if the Biſhop doth intermeddle within the Archdeaconry, where the Archdeaconry is by Preſcription, or *de jure*, in ſuch caſe the Archdeacon may have a Prohibition againſt the Biſhop. All which hath lately been adjudged in the Court of Kings Bench, *Trini.* 21. *Jac.* in *Caſtrell* and *Jon s* Caſe.

17. E. 3. 13. Coo. 5. part, in Cawdries Caſe.

8. H. 6. 3. by Chauntrell.

Cco. 1. part, Institut. 94.

The Archdeacon is *Oculus Episcopi*: And there are 60. Dignities of Archdeaconaries within the Realm of *England*; and these are divided into Deaneries, and Deaneries into Parishes, Towns and Hamlets.

To the Creation of every Archbishop and Bishop, there are necessarily required three things. 1. Election. 2. Confirmation. 3. Consecration and Investure: The Election is as the Sollicitation, the Confirmation is as the Contract, the Consecration is the Consummation of the Spiritual Marriage; The Restitution of the Temporalties, is as it were the bringing home of the wife.

Vid. 3. Car. in Evans and Ascoughs Case. Latch. Reports, 245

1. Election is made after this manner, *viz.* A Licence under the Great Seal of *England* is granted to the Dean and Chapter of the Cathedral Church, when the See of such Archbishop or Bishop is void, to proceed to the Election of a new Archbishop or Bishop, with a Letter Missive, containing the person whom they shall Elect or Choose to the said Archbishoprick or Bishoprick being void: This Election must be within twelve dayes after the Licence and

Vid. The Statute of 25. H. 8. cap. 20.

and Letters Missive are delived unto them. (if the Dean and Chapter, after the Letters Missive delivered do refuse or neglect to make the Election, they run into danger of a *præmunire*.) And if the Dean and Chapter defer their Election above twelve dayes after they have received the License, and the Letters Missive; Then and in such case, the King doth use by his Letters Patents under the Great Seal of *England*, to nominate or present the person to the Office and Dignity of a Bishop being void; And such Nomination or Presentment, if it be to the Office and Dignity of a Bishop, is usually to the Archbishop or Metrapolitan of the Province where the See of the Bishop is void: But if such Nomination or Presentment be made by the Kings Majestie, for default of Election of the Dean and Chapter unto the Office and Dignity of an Archbishop; Then the King by his Letters Patents under the Great Seal, doth Nominate or Present such Person as he shall think good to have the Dignity, unto one Archbishop and two other Bishops, or else to four such

Vid. Stat. 25. H. 8. cap. 20. sect. 3 Rastall. *Vid.* Cook. 12. part, Reports 59. ac.

Bishops of the Realm as shall be assigned by his Majestie: But if the Dean and Chapter, do after the Licence and Letters Missive, elect the person nominated in the Letters Missive, according to the Kings Pleasure therein; Then is the Election well made; And upon Certificate made of such Election unto the Kings Majesty under their common Seal, the person elected is reputed and called Lord Bishop Elect.

By this Election he is not absolute Bishop to all purposes; He is a Bishop *Nomine* only, *non re*; *Non habet Potestatem jurisdictionis neque Ordinis.* He is but as *Embryon in ventre*, till his Confirmation and Consecration: For if a man be but elected a Bishop, if there be cause to bring a Writ of Right in the Court of a Mannor which doth belong to his Bishoprick, the Writ shall not be directed *Episcopo*, but *Balivis* of the Bishop Elect. Neither doth Election of any person to any such Arch-bishoprick or Bishoprick, if he was before Parson or Vicar of any Church Presentative, or Dean of any Cathedral, or held any other Episcopal Dignity, make the first

Mich. 22. Iac. Latch. Reports, 246.

38. E. 3 31.

F.N.B. 1.

first Benefice, Deanery, or Dignity to be *ipso facto* void in Law; For that it hath been adjudged, that a *Commendam retinere* made to such a person of such Personage, Deanery, or other Dignity which the said Parson had before he was Elected Bishop, comes time enough in Trin. Term. 11. Jacob. in the Common pleas in *Colt* and the Bishop of *Coventry* and *Litchfields* Case: and in Pasch. 3. Car. 1. in the Kings Bench in *Evans* and *Ascoughs* Case, which Case see now at large reported.

Vide Colt and the Bishop of Coventry and Litchfields case in Roberts Reports. Tr. 30. Car. Evans and Ascoughs case Latch. 237.

If an Abbot pendant a Writ brought against him be made and Created Bishop, the Writ shall not abate, because the Creation of him a Bishop is not his own act, but the act of another, *viz.* of the King. And Election only of one to a Bishoprick, who had before a Benefice of Cure, or any other Ecclesiastical Dignity or Promotion, doth not make a Cessation of it; for if it should, it should be to the prejudice of the party.

V. 9. H. 5 13. a

20. E 3 Fitz. tit. Brief. 25.

The second thing incident to the Creation of an Archbishop, or Bishop, is, Confirmation, Consecration

on

on and Inveſture. This was anti-
38. E. 3. 30. ently done by Bulls and Breves from the Biſhop of *Rome*, who claimed a *Spiritual* Juriſdiction in this Realm. But now, ſince the Statute
V. Stat. 25. H. 8. cap. 20. of 25. H. 8. cap. 20. the ſame is done by the Archbiſhop, or Metropolitan of the Province in which ſuch Biſhoprick is void, with ſuch Benedictions and other Ceremonies as are requiſite: but it is to be noted, That before the Archbiſhop, or other Biſhop is Confirmed, Conſecrated, or Inveſted, He muſt take an Oath of Fealty unto the Kings Majeſty only, and then, after ſuch Oath taken, and Fealty done only to the Kings Majeſty, the King doth under his great Seal ſignifie his Election to one Archbiſhop, and two other Biſhops, or elſe unto four Biſhops within his Majeſties Dominions, thereby commanding them to confirm his Election, and to Conſecrate and inveſt the perſon; and to uſe ſuch Benedictions, and other Ceremonies as are requiſite thereunto.

V. 41. E. 3. St. tit. Qu. Imp. 129. As for his Confirmation and Conſecration he is compleat Biſhop to all

all purposes, as well to Temporalties as to Spiritualties. And then he hath *plenam protestatem Jurisdictionis, & Ordinis*: And therefore after he is Consecrated he may certifie an Excommengement: When he is Confirmed, the power of the Guardian of the Spiritualties doth cease. 18. Eliz. Dyer. 350. and *vid.* 22. E. 3. 13. Where a Writ awarded *Episcopo Electo & Confirmato*, to admit a Clerk to a Benefice, was holden good.

V. Coo. 8. pa. in Trollops case.
41. E. 3. 10.
Fitz. N. B. 64.
18. Eliz. Dyer. 350.
22. E. 3. 13.

When he is Consecrated, he may Confer Orders upon others, and may Consecrate Churches, or Chappels, which he could not do before his Consecration: For although by his Confirmation, *Conjugiam contrahitur Spirituale*, (as before is said) yet by Consecration, *Consumiter*.

After that he is confirmed, and before he is Consecrated Bishop, the King may by his Letters Patents grant unto him his Temporalties, and such Grant shall be good: But such a Grant from his Majesty is *potius de gratia quam de jure*. But after that he is Consecrated, Invested and installed in his Bishoprick, he

41. E. 3. 6.
46. E. 3. 23.

he is fully enabled for to sue for his
7. F.N.B. acc. Temporalties out of the Kings hand by a Writ *de restitutione Temporalium* directed to the Escheator; and so he shall enjoy the Actual possession of them: But yet the Temporalties are not *de jure* to be delivered unto him untill the Metropolitan hath certified the time of his Consecration,
38. E. 3. 30. although the Freehold of the Temporalties be in him by his very Consecration, as the Book in 38. E. 3. 30. is.

If a Bishop of one Dioces be translated to a Bishoprick in another Dioces, there needs no Confirma-
Tr. 3. Ca. B.R. in Evans and Ascoughs case. Latch. 237. tion, or new Consecration of him, for that Consecration once had its *Character indelibilis*; And although for Cause, or Crime, he may afterwards be deposed and removed from the See, or may be suspended *ab Officio & Beneficio*, that is to say, from the Execution of his Spiritual Jurisdiction, and from the Receiving the Temporalties and Profits of the Bishoprick: Yet still he re-
21. H. 6. 3. by Markham. teins the title of a Bishop, for that the Order cannot absolutely be taken from him, being (if not by Divine)

Divine) yet by Apoſtolical Inſtitution. *Tamen Quere.*

CHAP. II.

Of Deans and Chapters, and of their Elections: How all perſons belonging to Cathedral Churches held their poſſeſſions at the firſt together; And how and by whom they came afterwards to be divided and ſevered.

EVery Archbiſhop and Biſhop hath a Dean and Chapter conſiſting of Spiritual and Eccleſiaſtical perſons. There are four ſorts of Deans or Deaneries; of which, and of whom the Law of this Realm taketh knowledge. The firſt is a Dean who hath a Chapter conſiſting of Prebendaries or Cannons: For ſeeing, that it was impoſſible but that Sects, Schiſms and Hereſies ſhould ariſe in the Church, it was in Chriſtian policy thought fit and neceſſary, that the burthen of the whole Church, and the Government thereof ſhould not lie upon the perſon

son of the Bishop only: and therefore it was thought necessary that every Bishop within his Diocess should be assisted with a Council. 1. To consult with them in matters of difficulty concerning Religion, and deciding of the controversies thereof. 2. For the better ordering and disposing of the things of the Church, and to give their assent to such estates as the Bishop should make of the Temporalties of his Bishoprick; For it was not thought convenient that the whole power and charge thereof, should remain in any one sole person only; *i. e.* in the Bishop: and yet was the Dean and Chapter subordinate to the Bishop.

Cook 3. pt. in the case of the Dean and Chapter of *Norwich.*

The Dean which hath a Chapter, such as the Dean of *Canterbury*, St. *Pauls*, *&c.* is set forth to be an Ecclesiastical Governour Secular over the Prependaries and Cannons in the Cathedral Church. And the Patronage of all such Deaneries is in the Crown, and doth not belong unto any Subject. The antient Deans of Chapters come in as Bishops now do by a *Conge de Eslier*, and

and are confirmed by the Bishop: But those Deaneries which were translated from Priories and Covents, or which were founded after the Dissolution of Abbies and Monasteries by King *Henry* the eighth, or other Kings of this Realm, are now Donative, and by the Kings Letters Patents they are Installed. Cook. 1. pt. Institut. 99.

The Chapter are the Prebendaries or Cannons (as before is said) and is *Clericorum Congregatio sub uno Decano in Ecclesia Cathedrali.* Some Chapters are Antient, and some Later: the Later are of two sorts. 1. Those which were founded or translated by King *Henry* the eighth in the places of Abbots and Covents, or Priors and Covents which were Chapters whilest they stood: & these may be said to be new Chapters, but belonging to old Bishopricks. 2. They are said to be new Chapters, which are annexed unto new Bishopricks founded by King *Henry* the eighth: such as were *Bristol, Chester, Oxford.*

The second Dean, is a Dean who hath no Chapter; and yet he is Pre-

Preſentative, and hath cure of Souls; Who hath a Peculiar and Court, wherein he holdeth Eccleſiaſtical Juriſdiction; but he is not ſubject to the Viſitation of the Biſhop or Ordinary: Such a one is the Dean of *Battel* in *Suſſex*, which Deanery was founded by King *William* the Conqueror: And the Dean there hath Cure of Souls, and hath Spiritual Juriſdiction within the Liberty of *Battell*: and he is Preſentable by the Patron unto the Biſhop of the Dioceſs, and is admitted to the Deanery by Inſtitution and Induction by the Biſhop of *Chicheſter*, although he be exempt from the Viſitation of the ſame Biſhop. And the Patronage of ſuch a Deanery may be in a Subject, as the Patronage of the Deanery of *Battell* a long time hath been, and I believe yet is, and remains in the Family of the Lord Viſcount *Mountacute*.

The third Dean is Eccleſiaſtical alſo; but the Deanery is not Preſentative, but Donative, nor hath he any Cure of Souls; but he is only by Covenant or Condition, and he alſo hath a Court and a Peculiar,

in

in which he holdeth Plea and Jurisdiction of all such matters and things as are Ecclesiastical, and which do arise within his Peculiar, which oftentimes extends over many Parishes. Such a Dean Constituted by Commission from the Metropolitan of the Province, is the Dean of the Arches, and the Dean of *Bocking* in *Essex*; and of such Deaneries there are many more.

The fourth sort of Dean, is he who is usually nominated and called Rural Dean; He hath not any absolute Judicial power in himself, but is only to Order and Prepare the Ecclesiastical affairs within his Deanery and Precinct, by the Direction of the Bishop, or of the Archdeacon, and is a Substitute of the Bishop in many Cases; as in granting of Letters of Administration, Probate of Wills, *&c.* and took place first upon the Division of Parishes: For (as I said before) The Diocess of every Bishop was divided into Archdeaconries, and they into Deaneries, which were these Rural Deaneries, and these Deaneries into Parishes, Towns and Hamlets: But

the Power and Jurisdiction of these Rural Deans is now almost lost and extinguished, the same being encroached upon, and as it were swallowed up in the Office of the Archdeacon, and the Bishops Chancellor, who now execute their power and authority throughout all the Dioceſſes of the Bishops of *England*, although that in other Countreys, and in some part also of this Realm of *England*, the Jurisdiction of these Rural Deans is still in full force.

The Bishop, Dean and Chapter, (which were the Prebendaries or Cannons, as before is said) and all other persons belonging unto, or having any thing to do in Cathedral Churches, at the first, and in ancient times held their possessions together in gross; but afterwards for the avoiding of Confusion, and for better Order, and for some other special Causes known to the Kings and State of this Realm, the same were afterwards by them severed and divided; and part of the Lands and possessions belonging to the same Church were assigned to the Bishop and his Successors to hold by themselves, and other

11. H. 4. 9.

other parts thereof were aſſigned unto the Dean and Chapter to hold by themſelves; of which Lands they have ever ſince continued ſeverally ſeized in their ſeveral Capacities. This appeareth more plainly by the Book 17. E. 3. 29. where the Treaſurer of a Cathedral Church brought an Aſſize of ſome of his poſſeſſions in his own Name, and the Defendant pleaded in Barr a Releaſe of the Dean and Chapter, and it was ruled to be no Barr, becauſe that the Treaſurer now held his poſſeſſions ſevered from the poſſeſſions of the Dean and Chapter; and yet a *Leaſe* made of them by the Treaſurer, without the Confirmation of the Dean and Chapter, was holden not to be good, but only during his own time, and not to bind his Succeſſor. And alſo it hath been ſeen, That the Chapter alſo hath maintained Writs of their ſeveral poſſeſſions againſt the Dean. For the Prior of *Weſtminſter* brought a *Quare Impedit* for a Preſentation to a Church which belonged to his Priory againſt the Abbot of *Weſtminſter*, as was ſaid by *Pinchden*,

17. E. 3. 29.

17. E. 3. 64. b.

40. E. 3. 22. 20. E. 3. tit. Nonability 90. acc.

40 E. 3. 28. wherewith agreeth the Book of 20. E. 3. Fitz. title Nonability 9.

All Archbishops, Bishops, Deans, Prebendaries, Archdeacons, Parsons, Vicars, are Secular persons, and are not now Religious, although they are Church-men, or Men belonging to the Church. For no persons are said in Law to be Religious, but such only as have vowed three things, *viz.* Obedience to the Soveraign of their House and Order; perpetual Chastity; and wilfull poverty; Or such as are professed in some Religious Order, as the Augustine and Franciscan Monks, *&c.* Yet may all such Ecclesiastical persons Secular hold Lands in Frankalmoigne, and Lands at this day may be given to them and their Successors to be holden in Frankalmoigne, with the Consent of the King, and of the Lords Mediate and Immediate, notwithstanding the Statute of *Mortmain.* For that *Quilibet potest renunciare juri pro se introducto*; And if they do consist of a sole Corporation or body Politick, as Bishop, Prebendary, Parson, Vicar,

V. Cook 2. pt. in the Bishop of *Canterburies* Case.
21 H. 7. 39.
49. E. 3. 14.

Vicar, *&c.* a Feoffment may be made to them of Lands *in Libra Elemoſina*, either by Deed or without Deed, and the Fee-ſimple ſhall paſs unto them without the word (Succeſſors.) But if any ſuch Feoffment be made to a Corporation Aggregate of many perſons, as to Dean and Chapter, *&c.* there to paſs the Inheritance unto them, there muſt be the word Succeſſors in the *Habendum* of the Deed, and the Feoffment muſt be by Deed, otherwiſe it is not good in Law.

CHAP. III.

Of the Capacities of Biſhops, Deans and Chapters, Prebendaries, Parſons, Vicars, and other Eccleſiaſtical perſons, to Purchaſe, Hold, and Grant: And of Different Acts and things to be done by them, and to them.

EVery Archbiſhop, Biſhop, Archdeacon, Dean, Prebendarie, Parſon, Vicar, or other Corporation Spiritual, Sole, or Aggregate, have a double Capacity in them to Pur-

chase, Hold or Grant. If Lands be given to a sole body Politique or Corporate, as to a Bishop, Archdeacon, Prebendary, Parson, Vicar, there to give them an estate of Inheritance in his or their Politique or Corporate Capacity, there must be these words in the Grant or Deed, *viz.* To Have and to Hold to him and his Successors; for without the word (Successors) in such cases the Inheritance passeth not unto them, except (as before is said) in the Case of *Frankalmoigne*: But if Lands be given to a Dean and Chapter, or other Corporation Aggregate, they may have an Inheritance, or a Fee simple in the thing passed unto them without the word (Successors) for that the said body Politique never dyeth; but then they must take the thing granted in their politique Capacity, and not in their natural Capacity. If the King by his Letters Patents, grants Lands *Decano & Capitulo*, &c. *Habendum sibi & heredibus & successoribus suis*; The grant shall run to the Dean and Chapter and his Successors in their politique Capacity, and not to him and his heirs

7. E. 3. 25. 25. E. 3. 35. Cook. 1. Inst. 8.

18. H. 6. 11.

heirs in his natural Capacity.

There is a great difference in things to be done by Corporations Spirituall, which are Sole; and Corporations Spiritual which are Aggregate of many persons: 1. If a Sole Corporation, as a Bishop, Prebendary, Parson, Vicar, *&c.* make a Feoffment in Fee, with a Letter of Attorney for to deliver Livery and Seisin of the Lands, the Livery must be made in the life time of the Bishop, Prebendary, Parson, or Vicar, *&c.* But if a Dean and Chapter, or other Corporation Aggregate, make a Deed of Feoffment of Lands, with a Letter of Attorney for to make Livery and Seisin, there Livery made by the Attorney after the death of the Dean is good, and shall stand effectual in Law. 2. A Sole Corporation, as a Bishop seized in the right of his Bishoprick, shall do Homage; but a Parson or a Vicar who have but a Qualified Fee in them, shall neither do Homage nor receive Homage: Neither shall a Dean and Chapter do Homage, because they cannot do it in person; and Homage must alwayes be done in person: Neither shall a

18. H. 8. 9. 11. H. 7. 19. acc.

Cook 1. part Institut. 52.

Temp. E. 1. Fitz. Juris utrum. 13. 8. E. 3. 28.

33. H. 8. Br. Fealty, 18.

Cook 7 pr. 10 Cook 10 part. 31. acc.

Bishop do Escuage in person, but he shall find an able man to do the same: For it is a Rule, That *Nemo militans Deo implicet se secularibus negotiis.* And the old Books are, That the Homage which a Bishop doth, is rather Fealty then Homage: For that it wanteth the words of Homage, *viz. Jeo de veigne vostre home*, &c. Yet in the opinion of *Cook* chief Justice, in his first book of Institutes, 65. it is Homage, because he saith, I do you Homage. 3. A Corporation Spiritual Sole, as a Parson, Prebendary, Vicar, *&c.* who had not the absolute Fee-simple of the Lands in them, could not have charged their Lands or Possessions, without the assent of their Patrons or Founders: But a Corporation Aggregate of many persons, as a Dean and Chapter, Master of a Colledge and Fellows, *&c.* who had the absolute Fee simple of the Lands in them, might have made Grants, and thereby charged their possessions, or might have discontinued their Lands or Possessions without the assent of their Founders.

Glanvil. lib. 9. cap. 1.

39. E. 3. 7.
6. E. 2. 16.
9. E. 4 6.
38. E. 3. 19.

CHAP.

Chap. IV.

Of Leases made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars: And where their Leases are good by the Statute of 32. H. 8. 1. & 13. Eliz. and other Statutes. Where not.

EVery Archbishop, Bishop, Archdeacon, Prebendary, Parson, Vicar, and other Corporation Spiritual, by the Common Law might have made Leases *Concurrentibus his qui in lege requiruntur*, for lives or years without limitation, or stint of time. But they are now by the Statutes of 32. H. 8. Stat. of 1. & 13. Eliz. and other Statutes, restrained to make any Leases of their Lands or Possessions belonging to the Church, but according to such limitations and under such provisoes as are mentioned in the said Statutes. Cook 5. part, 14. Cook 10. part, 60. Cook 11. part, 66.

Now by the Statute of 32. H. 8. which is an enabling Statute to some persons and purposes, A Bishop by his Deed, without the Dean and Chapter: Cook 1. part. Institut. 44.

Chapter: A Parson seized in Fee in the right of his Church, may make Leases under these Cautions, Limitations, and Provisoes following, *viz.* 1. The Lease must be made in writing by Deed Indented, and not by word. 2. The Lease must begin from the day of the Date thereof, or from the making thereof. 3. The old Lease must be surrendred, expired, or ended within one year at the making of the second *Lease*; and such surrender must be absolute, and not conditional. 4. There must not be a double Lease in being at one time. 5. The Lease must not exceed twenty one years, or three lives from the making thereof. 6. The Lease must be of Lands or Tenements maynorable, out of which a Rent may be reserved. 7. The Lease must be of Lands or Tenements which commonly have been letten to Farm by the space of twenty years next before the Lease made. 8. There must be reserved to them and their Successors so much yearly Rent, or more, which hath been accustomably used to be paid for the said Lands or Tenements within twenty years before the Lease made.

Cook 5. pt. 6. in the Lord Mountjoyes Case.

Cook 5. pt. 2. Elmors Case.

Cook 6 pt. 37. The Dean and Chapter of *Worcesters* Case.

Cook 5. pt. 6. Cook 6. part, 37. acc.

made. 9. The *Statute* of 32. H. 8. doth not extend to any Leaſe to be made without impeachmeat of Waſte. Cook 6. part. 37.

A Parſon, Vicar, *&c.* if they make Leaſes for twenty one years, or three lives, according to the enabling Statute of 32. H. 8. they are out of the Statute, and their Leaſes muſt be confirmed by the Patron and Ordinary; But a Biſhop who is ſeized in the right of his Biſhoprick; A Dean of his Sole poſſeſſions ſeized *in jure Daconatus*; An Archdeacon ſeized *in jure Archidiaconatus*; and a Prebendary ſeiſed *in jure Prebendæ*; every one of them is ſeized *in jure Eccleſiæ*, and may make Leaſes with the Cautions, and under the Limitations and Proviſoes before mentioned, without Confirmation.

If a Biſhop maketh a Leaſe for twenty one years, and all thoſe years are ſpent or run out ſaving three or more; yet may the Biſhop make a new Leaſe for twenty one years to begin from the making according to the Exception of the Statute, but not a Leaſe for life or lives; and ſuch concurrent Leaſe hath been reſolved

to

to be good, as well upon the Exception of 1. Eliz. which extends to Spiritual and Eccleſiaſtical Corporations, which the Statute of 32. H. 8. did not do; but then in the caſe of concurrent Leaſe, in the caſe of a Biſhop, it muſt be confirmed by the Dean and Chapter: For the making of this good, I ſhall ſhew you only two Preſidents and Reſolutions.

Marſhals Caſe vouched in Wroth, and the Counteſs of *Suſſex* caſe. Paſ. 28. Eliz. B. R. Leonards Reports 1. pt. 131.

See *Paſ.* 38. Eliz. in B. R. in *Wroth* and the Counteſs of *Suſſex* Caſe, upon the Statute of 1. Eliz. where it is ſaid it was adjudged in one *Marſhals* Caſe: Where the Biſhop of *Canterbury* made a Leaſe unto him for twenty one years, to begin at the end of the firſt Leaſe, was adjudged to be void. But in the great Caſe which was in the Exchequer Chamber upon this point, there the ſecond Leaſe was in poſſeſſion, and to begin preſently, and to run out with the other Leaſe; and therefore it was adjudged to be good, becauſe the Land was charged but with twenty one years, and no more.

Paſe. 29 Eliz. in B. R. Bunney and Weights Caſe.

A. Biſhop of *London* Leaſed parcel of the poſſeſſions of his Biſhoprick for twenty one years, and afterwards he

he put out his Lessee, and then Leased the Lands to another for three lives, rendring the antient and accustomed Rent which was confirmed by the Dean and Chapter: Afterwards *A.* was translated to another See; In this case it was Resolved by the Justices, That the Lease was warranted by the Statute of 1. Eliz. and in this case it was said, That at the Common Law, a Bishop might make an Alienation in Fee-simple, being confirmed by the Dean and Chapter: But by the Statute of 32. H. 8. Bishops without Dean and Chapter, or their Confirmation, might make Leases for twenty one years, but with their Confirmation they might make Leases for a thousand years: But now by the Statute of 1. Eliz. their power in that is much abridged, for that now with Confirmation or without Confirmation, they cannot dispose of their possessions but for twenty one years, or three lives.

Note, That all Leases not warranted by the Statute of 1. Eliz. and 13. Eliz. stand good against the Lessors themselves, and are voidable only by their Successors. But if a Parson,

Vid. Cook 3. part, in Lincoln Colledge Case.

son, Dean, Prebendary, Vicar, make a Lease for years or for life, the same is void by his death, by the Statute of 14. Eliz. And if it be for twenty one years, or three lives, it were void by the Statute of 13. Eliz. if it be not made according to the Provisoes and Limitations above-mentioned.

Pasc. 29. Eliz. inn Coo. 8. Hunt and Singletons Case, acc.

CHAP. V.

Of Alienations and Discontinuances made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars; Where their Grants, Charges, or Leases were good at the Common Law without Confirmation; Where not; And by what Statutes they are restrained to discontinue or alien their Lands or Possessions.

BY the Statutes of 1. & 13. Eliz. and 1. Jacob. Bishops and all other Ecclesiastical persons are restrained to alien or to discontinue any of their Ecclesiastical Lands or Possessions; And if they do convey and alien away any of their said Lands or Pos-

Vid. Cook 5. part, 14. *Vid.* 29 Eliz. Lenn. 1. part, Bunney and Wrights Case. acc.

Possessions, although that it be unto the King himself, yet the alienation is void in Law: For although that the King be not expresly named in the Act of 1. Jac. yet the said Statute being made to suppress Alienations, Discontinuances and Wrongs done by Clergy-men to their Successors, the King is included in the general words of the Statute, *viz.* the words *person* or *persons*. Cook 11. pt. in Magdalen Colledge Case.

If a Bishop had been Patron of a Church, the Bishop could not make any Grant by the Parson or Incumbent of the Lands of his Parsonage good, either by his Licence precedent, or by his Confirmation subsequent, without the Confirmation of the Dean and Chapter: But if there had been Parson, Patron, and Ordinary, and the Patron and Ordinary had given Licence by their Deed to the Parson to have granted a Rent charge out of the Gleab, and the Parson had made such a grant, the same should have bounden the Successors of the Parson at the Common Law, before the said restraining Statutes, although it had not been confirmed afterwards, and that by reason of the pre- 11. H. 6. 9. 31. H. 8. br. tit. charge 40.

precedent Licence; and also in such case, the Ordinary alone might have agreed to such a Grant of a Rent charge by his Licence precedent, or Confirmation subsequent, without the Confirmation of the Dean and Chapter, because that in that case, the Confirmation or Licence of the Patron had not been good to have made the charge perpetual upon the Church, unless the Patron had had a Fee-simple in the Patronage, which if he had had, then the Grant of the Rent by the Parson *concurrentibus his*, had been good, and should have charged the Lands, and bound the Successors of the Parson at the Common Law, before the restraining Statutes.

31. E. 3. Fitz. tit. Grant. 61. 16. Ass. 38. 9. Eliz. Dyer 252. acc.

Now; *Confirmare*, or a Confirmation is but *firmum facere*, and is as it were but an assent to the Act or Deed of the Bishop, Parson, *&c.* and therefore although the Confirmation had not been alwayes of the estate, yet if it had been but of the Deed of the Bishop, *&c.* the same had been sufficient. And therefore if a Bishop before the said restraining Statutes of 1. Eliz, and 1. Jacob. had made a Feoff-

Feoffment in Fee of Lands parcell of his Bishoprick: And the Dean and Chapter by their Deed, had confirmed the Deed of the Bishop, the same had been good. So if a Bishop by Deed enrolled, had conveyed Lands unto the King, and the Dean and Chapter had confirmed the Deed of the Bishop, and afterwards the Deed had been enrolled, it had been sufficient to have confirmed the Lands unto the King, although that the Deed of the Dean and Chapter had not been enrolled. For the assent was to be made to the Act of the Bishop, and to him, and not unto the King: But at this day (as I said before) Bishops cannot make any Conveyances, thereby to prejudice their Sees or Successors; Yet this doth not take away the Rule of Law, but that a Confirmation made of the Deed of the Bishop or Parson, at this day is sufficient, although that the estate is not confirmed which is granted by the Bishops or Parsons Deed: And therefore, if since the Statute of 13. Eliz. a Parson, Vicar, &c. make a Lease for twenty one years or three lives, and the Patron

Cook 1. part, Institut. 301.

and Ordinary do confirm the Deed of the Parson or Vicar, this shall (as I conceive) make the Lease good to some purposes, and shall be a Confirmation of the Lease it self, although the Term be not thereby confirmed.

If Parson and Ordinary make a Lease for years of the Gleab Lands to the Patron, and afterwards the Patron doth assign or grant this Lease over to another Parson by his Deed, the assignment is good, and a Confirmation of the first Lease made unto himself: And the Deeed of the Patron doth amount to a double intent, *viz.* both to make the Assignment of the Lease good, and to a Confirmation of that Lease to the Assignee.

Vid. Cook 1. part, Institut. 15.

There is a difference betwixt a Confirmation of the Term, and a Confirmation of the Lands: And therefore if before the Statute of 13. Eliz. a Prebendary had made a Lease for seventy years of the Corps of his Prebend, and the Bishop Patron of the Prebend, and the Dean and Chapter had confirmed *dimissionem prædictam* for fifty years, *& non ultra*,

Cook 5. part, 81. Fords case.

ultra, the Confirmation had extended to the whole Term, and the Word (for fifty years *& non ultra*) had been void. But if the Bishop and Dean and Chapter, had recited the Lease for seventy years, and had confirmed the Lands to the Lessee for fifty years, the Confirmation had been good for those fifty years only.

If a Bishop hath two Chapters, (as there may be two, or more unto one Bishoprick,) both of the Chapters must confirm Leases made by the Bishop: But if one of the Chapters after the Date, or making of the Lease be Dissolved, there a Confirmation by the Chapter which is in being, is sufficient to make the Lease good; and in such Case, there needeth not any Confirmation of the King, who is Supream Patron (as before is said) of all the Bishopricks in *England*.

Temps. R. 2. Fitz. tit. grants 104. 50. E. 3. title Assize on Statutem. acc. *V.* 11. Fliz. Dyer. 282.

Cook 1. part. Institute 301.

If a Dean of a Cathedral Church be elected Bishop of another See, with a Dispensation *retinere Diaconatum in Commendam*, If after the Bishop of that See (whereof he was the Dean and Head of the Chapter)

do make a Leaſe of parcel of the poſſeſſions of the Biſhoprick, the Confirmation of the Leaſe by the Commendatory Dean is good, as it was adjudged in 3. Car. in the Kings Bench in *Evans* and *Aſcoughs* Caſe.

V. This Caſe. Reported 3. Car. in Latches Reports, 234.

There is another Rule in Law, *viz.* That *Prælatus Eccleſiæ ſuæ conditionem meliorare poteſt, deteriorare nequit*. And therefore if a Biſhop, Parſon, *&c.* purchaſeth Lands to him and his Succeſſors, he himſelf afterwards cannot wave the purchaſe; but his Succeſſor upon juſt Cauſe ſhewed, *viz.* upon Cauſe ſhewed, That the Rent to be paid upon the purchaſe is of greater yearly value then the Land purchaſed is, may wave ſuch purchaſe made by his Predeceſſor. And ſo, if a Prebendary, Parſon, Vicar, or other Corporation Spiritual be ſeized in the right of their Churches, They cannot diſclaim in that thing which was ſeized in the Church, becauſe they cannot diveſt by their Diſclaimer that thing which was veſted in their Church: But if a *Quo warranto* be brought againſt ſuch Biſhop,

43. E. 3. 23.

46. E. 3. 27.
5. E. 4. 1.
6. H. 3. 51.
26. H. 6. 46. a. by Markham.
6. E. 3. 52.

ſhop, Prebendary, Parſon, *&c.* by the King for Liberties, or Franchiſes uſurped by them from the King: in ſuch ſpecial Caſe they may diſclaim in the ſaid Liberties or Franchiſes, and ſuch Diſclaimer ſhall bind their Succeſſors.

If a Biſhop make any Leaſe, grant any Rent Charge, enter into any Warranty, or doth any other act or thing, which tendeth to the Diminution of any of the Revenues which ought to be, and continue for the maintenance of his Succeſſor; If the Biſhop be depoſed, tranſlated, removed, or dyeth, the Succeſſor ſhall avoid ſuch Leaſe, Grant, Charge, Warranty, *&c.* But if a Biſhop, being both Patron and Ordinary, doth Confirm a Leaſe made by the Parſon without the Dean and Chapter, and after the Parſon dyeth, and the Biſhop Collates another to the Benefice, and is afterwards depoſed, tranſlated, or dyeth, yet the Confirmation of that is, and ſtands good, becauſe there the Revenues which are to maintain the Succeſſor, are not thereby diminiſhed.

If a Parſon, *&c.* bringeth a Writ

Cook 1. part, Instit. 370.

of *Juris utrum* for any thing which concerneth the Church, and the Defendant pleads in barr the Warranty of his Predeceſſor or Anceſtor, the Plaintiff ſhall not be barred by ſuch Warranty, for that the Parſon demandeth the thing in the right of his Church, and in his politick Capacity: And ſo it is if the Parſon bringeth an Aſſize; although that thereby he recovereth the Land, and he himſelf is to take the profits to his own uſe; yet becauſe after the Recovery, he is ſeized of the Freehold whereof the Aſſize was brought in the Right of the Church, a Warranty of his Predeceſſor or Anceſtor pleaded in barr ſhall not barr him. The like Law is of an Archdeacon, Prebend, Vicar, *&c.* for the poſſeſſions concerning their Archdeaconry, Prebendary, or Vicarige, they ſhall not be barred by any Warranty of their Predeceſſors or Anceſtors.

27 H. 6. Fitz. tit. Garranty. 48.

If there be Lord Meſne Prior and Tenant, the Meſne cannot be forejudged in a Writ of Meſne within the Statut. of Weſtm. 2. Cap. 9. becauſe he cannot do any thing to the

the prejudice of his house, or Church: and so is the Law of a Bishop, Parson, Vicar, *&c.*

A Prebendary, Parson, Vicar, *&c.* for the benefit of their Churches, shall be esteemed to have the Fee-simple of the Gleab Lands in them; For they shall have and maintain an Action of Waste for Waste Committed in the Gleab, and in the Writ it shall be said, that the Waste is *ad Exhæredationem Ecclesiæ*: but a Parson, Prebendary, Vicar, *&c.* cannot discontinue the Fee of the Gleab; And if they make Leases for years, reserving Rent and dye, their Leases are now void by their deaths, and no acceptance of Rent by their Successors shall make such void Leases to be good; Otherwise it is, if they make Leases for lives; there the acceptance of the Rent by the Successor will make such Leases good, because the Leases were not void, but voidable only: But if a Bishop, Abbot, Prior, *&c.* make Leases for years and dye, and the Successors do accept of the Rent, they shall never avoid the Lease, for that the Leases were not void, but voidable. But

Cook 3. part. 65. in Pennants Case.

all Leases made by them at this day must be with, and under the Provisoes and Limitations in the precedent Chapter before mentioned; otherwise the Leases will not be good.

CHAP. VI.

Of Advowsons in general; The Original of them: How they first began, and who were the first Founders of them. And in whom the Patronage of all Advowsons was first setled.

I Do not find that in, or by any Record which I could yet see, nor is it mentioned in any of the books of Terms, or in any other books of the Common Law of *England*, when Advowsons had their first Original within these Islands of *England*, *Scotland* and *Ireland*: But this I do conceive, that in the Saxons times, after the first Division of the Realm of *England* into Parts or Counties, and after the

the conferring of great Lordſhips, Mannors and Lands to the Lords, Peers, and great Perſons of the Realm, and others; and after Seigniories were firſt erected and eſtabliſhed within the ſaid Realms; and after the firſt planting of the Chriſtian Faith within theſe Iſlands of *England*, *Scotland* and *Ireland*, (which I do not find to have been before the Saxons taking of the Government of theſe Nations) I do conceive, that then, and not before, that the Kings of theſe Iſlands did firſt begin to erect Cathedral Churches, Create Biſhoprieks, erect Monaſteries, Abbies and Priories, and other Religious houſes for the receiving into them of ſuch perſons as profeſſed the Chriſtian Faith: and that afterwards in imitation of the ſaid Kings, particular Lords of great Seigniories, Lordſhips and Lands, and other perſons of Ability did upon parcel of their Demeſne Lands build and erect particular Churches, and endowed them with ſundry parcels of Lands, and with other profits and immunities for the better maintenance of ſuch perſons

persons as took upon them the publishing and defence of the Christian Faith, reserving unto the several Founders of the said Monasteries, Priories and Churches, a Right and power to confer and bestow the said Abbies, Priories, Churches and Lands, and other things to them annexed, and with which they were endowed, unto such persons as they should think fit to confer the same upon, to be to them and their Successors for ever: And hence it was, that it was said by *Parming* in 7. Ed. 3. Fitz. title *Quare impedit* 19. That by the Grant of the Church, the Advowson thereof did pass: and that there also *Herle* Justice said, That long a man did not know what Advowson was, but when he would give the Advowson, he only said, that he gave the Church. And for the word (Advowson) I find in 30. E. 3. 21. Fitz. tit. *Quare impedit.* 5. That the same is not appropriated to a Church only, but to other Ecclesiastical Foundations, as namely to a Priory, or others: For I find, that *John de Boys* brought a *Quare impedit* against the

7. E. 3. tit. Qu. Imp. 19.

30. E. 3. Qu. Imp. 5.

the Biſhop of *London*, and counted, that he was ſeized of the Priory of W. to which the Biſhop had diſturbed him to preſent, and therewith agree divers others of our old year books, as 24. E. 3. Qu. Imp. 27. 6. E. 3. Qu. Imp. 38, and 11. E. 3. Qu. Imp. 107.

24. E. 3. Qu. Imp. 27. 6. E. 3. Qu. Imp. 38. 11. E. 3. Qu. Imp. 107.

An Advowſon then in general, is a Right of Preſentation, which the Founder of any Monaſtery, Abby, Priory, Church, Chappel, hath reſerved unto himſelf, his Heirs, or Succeſſors upon the Foundation thereof, to confer or beſtow the ſame ſo often as the ſame ſhall happen to be vacant, or become void, to, and upon any perſon or perſons, who is, or are capable to receive the ſame; and fitly may be applyed unto any thing of which a man may have a *Quare Impedit* if he be diſturbed in the Donation of, or Preſentation to the ſame; as appeareth by theſe books and Authorities following; that is to ſay, if he be diſturbed in his Preſentation to an Abby 22. H. 6. 25. 25. E. 3. Qu. Imp. 16. 10. E. 3. 32. 29. E. 3. Qu. Imp. 151. 11. H. R. 2. Fitz. tit.

tit. Brief. 643. 29. E. 3. Qu. Imp. 190. To a Prebend, 7. E. 3. Qu. Imp. 21. 31. E. 3. Qu. Imp. 165. 13. R. 2. tit. Brief. 163. To a Vicarige, 5. E. 3. tit. Qu. Imp. To a Priory, 17. E. 3. Qu. Imp. 70. To a Deanery, 21. & 29. E. 3. Qu. Imp. 26 & 18. To a Chappel, 17. E. 3. 13. And Fitz. Na. Brevium 33. To a Chauntry which is Donative.

Advowson is called by some Patronage, or a Right of presenting to the Church: *Cowell* in his title *Patronus* saith, *Jus Patronatus est jus presentandi Clericum ad Ecclesiam vacantem ex parte ei Concessum, qui Consentiente Episcopo vel instruxit, vel dotavit Ecclesiam.* And *Bracton*, *Advocatus est, ad quem pertinet jus Advocationis, ut ad Ecclesiam Nomine proprio, non alieno possit presentare.* They who were Patrons were sometimes called *Advocati*: because as Advocates do defend the Causes of their Clients, so the Patrons did take upon them to protect and defend their Churches and their Presentees thereunto, against all usurpers of the same. And hence it is that they were sometimes called

Patron

Patroni à Patrocinio, from defence. For being the first Founders of the Church, and endowing them with Lands, Livings, and other immunities, priviledges and things, there was reserved to them, their Heirs and Successors (as before is said) the full and only power of disposing of the said Churches upon all Avoidances of the same, and of the providing of a Competent & fitting Incumbent for the same, and therefore saith a Learned Civilian, *Tenetur Patronus protegere Ecclesiam, & reparare si minitetur ruinam, & de bono Sacerdote providere.*

The Right of Presentation, or of Patronage is a real right fixed in the Patron or Founder of the Church & his Heirs or Successors for ever: & is the same and the like, which Founders of Abbies, Priories and Monasteries have, or had to their Abbies and Priories. And the Patrons of Advowsons of Churches have and ever had as absolute property and Ownership in and to their said Churches, as any other man had or hath to any other his Lands, Tenemenrs and Hereditaments whatsoever, as appeareth

peareth by several of our Book Cases, *viz.* 8. Ass. 29. 13. Ass. 22. 11. H. 4. 64. I shall cite but two Cases more to prove the same, Pasch. 9. E. 3. Qu. Imp. 30. A. was Patron of the Priory of *Spalding*, and by Deed Indented between A. the Patron, and B. the Prior, it was covenanted, That at every Avoidance of the Priory, That they should not have any thing in the Priory, but only for to choose their Prior, to be maintained out of the Priory, saving unto A. the Patron and his Heirs all Presentations to Churches which should fall void: In a *Quare Impedit* brought against the Sub-Prior and Covent by A. the Patron, for a Presentation to a Church annexed to the Priory which became void, it was adjudged, that by the saving, the Advowson of the said Church did remain to A. the Patron and his heirs; and upon the acknowledgement of the Deed aforesaid A. had a Writ to the Bishop to admit his Clerk to the said Church.

9. E. 3. Qu. Imp. 30.

38. Ass. p. 22. The Prior of *Plymptons* Case, that the King founded

38 Ass pl. 22.

ed the Chappel of P. and endowed the same with two Hides of Land: The King was the Patron. And although afterwards the Chappel and Lands came to the hands of a Prior, which Priory (after the gift) was founded by the Bishop, and the King after the Foundation of the said Priory, did grant to the Prior and Covent *quod transferre & tenere possint Ecclesiam*, and did also grant the two Hides of Lands *Canonicis quos Episcopus posuit*: Yet in that Case, because the King by his Charter doth not grant the Patronage by express words, It was adjudged, That the King remained Patron. And although the Prior after the Foundation had presented time out of mind to the Chappel, yet it was adjudged, That the same did not take away the Kings title of Patronage.

CHAP.

CHAP. VII.

That the Right of Patrons to Present to Advowsons of Churches, is a Temporal, and not a Spiritual Inheritance.

THE Right of Patronage, or of Patrons to Present to Churches and other Ecclesiastical Dignities and Promotions, being the same with the Right of Founders, as by the books of 8. E. 3. & 13. Ass. is said: and the Common Law having reserved the power of Conferring of Benefices upon the Avoydances of the Churches by Death, Resignation, or otherwise, to the Patrons and their heirs: It is now to be seen by what authorities and reasons, collected out of the books of the Common Law, this Right of Presentment is proved to be a Temporal Inheritance in the Patron and his heirs, and not an Inheritance which is Ecclesiastical.

I shall set forth, shortly, some reasons, and back them with au-

authorities of Law. First, It is proved to be a Temporal Inheritance, becauſe an Advowſon, or the right of the Patron to Preſent may be Appendant unto, and is parcel of a Mannor many times which is a Temporal inheritance, as it is ſaid in 5. H. 7. 37. b. And the Appendant must be of the ſame nature and condition as the Principal is. 1. When a Mannor was firſt created, and Land parcel thereof was given to build or erect a Church upon it, the Advowſon of that Church became Appendant to the Mannor, which was a Temporal thing; and therefore it hath been holden, That by the Grant of the Mannor, *cum pertinentiis*, that the Advowſon of the Church paſſed thereby. 5. H. 7. 37. b.

In 33. H. 6. 33. if a man be diſſeiſed of a Mannor unto which an Advowſon is Appendant, and the Church becomes void; and the Diſſeiſee doth after enter into the Mannor, the ſaid entry ſhall veſt the Advowſon again on the Diſſeiſee, becauſe the Advowſon is parcell of and Appendant to the ſaid Mannor; and therewith agree the Books 33. H. 6. 33.

of 9 E. 3. 39. and 19 H. 6. 33.

Cook 10 part, Whistlers Case.

In Cook. 10. part in *Whistlers* Case. If the King be seized of the Mannor of D. to which the Advowson is Appendant, and Leaseth the Mannor to I. S. for years, excepting the Advowson, and afterwards the King by his Letters Patents grants *totum illud Manerium de D. cum pertinentiis* to I. D. in Fee, *exceptis quæ in eisdem Litteris Patentibus excipiuntur. Et ulterius*, grants *Manerium prædict, & omnia & singula præmissa cum pertinentiis adeo plene & integre & in tam amplis modo & forma prout præmissa ad manus nostras devenerant*: It was adjudged in that Case, That by the Grant of the Mannor without making mention of the Advowson, that the Advowson passed, because it was parcel of an appendant to the Mannor: But if the Advowson had been severed from the Mannor and been in gross, that by the Grant of the Mannor, the Advowson had not passed without special words of the Advowson in the Grant; No more then it did in the Case in 38 H. 6. 26. the Abbot of *Syons* Case; where the Case was, That the King was seized

of

of the Mannor of D. to which an Advowſon was Appendant, in the right of his Crown; and by his Letters Patents Leaſed the ſaid Mannor (amongſt other things) to A. and B. his wife for the Term of their lives, and afterwards the King reciting the ſaid Leaſe, for the lives of A. and B. granted *Manerium prædictum* which A. and B. held for their lives, unto C. D. and E. and their heirs. It was holden in that Caſe, that becauſe the Advowſon was not mentioned in the Grant, but in the *Habendum* only, That the Advowſon did not paſs by the Letters Patents to the ſaid C. D. and E. becauſe the ſaid Advowſon remained in the King as in groſs, and was not mentioned in the Grant, but in the *Habendum* only. But if the Advowſon had been before in the words of the Grant, before the *Habendum*, then the Advowſon had paſſed unto them.

Secondly, An Advowſon is a Temporal Inheritance, becauſe it lieth in Tenure, and may be holden either of the King *in Capite*, as the Book of 12 H. 7. 19. is; or of a common perſon, by 21 E. 3. 5. where a *Quare* 12 H. 7. 19. 21 E. 3. 5.

Impedit was brought against the Abbot of *Welbeck*, and the Plaintiff there counted, That the said Abbot held the said Advowson of him by Homage, Fealty and Escuage.

33 H. 6. 34. 33. H. 6. 34. b. in a Writ of Annuity brought by the Prior of *Castleacre*, against the Prior of *Bentley*, the Defendant pleaded, That he was seised of the Advowson of *Aspall* in the County of *Sussex*, *ut de feudo & jure Monasterii sui de Bentley*, and that he held the Advowson of the Prior of *Castleacre* by the service of Fealty, and 2. s. 8. *d. per an.* And it was there agreed, That an Advowson doth lie in Tenure, and that the Lord might distrain in the Gleab Lands for the Rents and Services, the Cattle of the Patron, if he found any upon the Lands, but not the Cattle of a stranger.

22 E. 3. 3. In 22. E. 3. 3. a Writ of *Cessavit* was brought against *John de Gremesley* Parson of the Church, where the Tenant demanded the View, and he was ousted of the View, because it was of his own Cesser; and afterwards he prayed in Aide of the Patron and Ordinary, and the

Aide

Aide was granted him.

24. E. 3. 46. a. in a Writ of Right of Advowſon, it is ſaid, That the Tenant ſhall be ſummoned in the Gleab of the Church: And ſo it is in a *Quare Impedit*; the Summons muſt be in the Church; and to conclude this reaſon, The Writ of Right of Advowſon it ſelf doth ſuppoſe a Tenure; for the words of the Writ are, *Quod clamat tenore*, as the Book of 15. H. 8. is by all the Juſtices. 24 E. 3. 46. a.

Thirdly, That an Advowſon is a Temporal Inheritance, it appeareth in this, that a *Præcipe quod reddat* lyeth thereof, as the Book 20. E. 4. 15. is, That the wife may be endowed thereof, as the Book of 19. E. 3. *Fitz. tit. Quare Impedit*, 154. is; That the Husband may be Tenant by the Curteſie thereof, as 7 E. 3. 66. 3. H. 7. 5. and 5. E. 4. 7. is: That it may be forfeited and loſt by Attainder, Uſurpation, Recuſancy, Outlawry, as the Books of 9. H. 6. 57. and *Cook* 10. part 55. are. That it may be divided betwixt Parcencrs either by word or writing, as *Cook* 1. part, Inſtitut. 164. 13. E. 2. *Quare Im-* 19 E. 3. *Quare Imp.* 154. 7 E. 3. 66. 3 H. 7. 5. 5 E. 4. 7. Cook 1. part, Inſtitute 154.

34 H. 6. 40. *Impedit*, 170. 5. H. 7. 8. and 34. H. 6. 40. are; That it may be given in Exchange for other Temporal Inheritances, as 11 H. 4. 54. is. That it is valuable, and shall be Assets in a *Formedon*, as the Books of 5 H. 7. 37. 32 H. 6. 25. and 33 H. 6. title garrantry 33. are. That by the Grant of all Lands and Tenements, an Advowson will pass, as is said in 11 H. 6. 4. by *Martin*. And although it passeth not by Livery and Seisin; (although that some Books are that it may pass by Livery of the ring of the Church door, as the Books of 43. E. 3. 1. and 6 H. 7. 3. by *Townsend* are) Yet by Deed it is grantable ever, as all other Inheritances are, and the delivery of the Deed of Grant of it, shall stand in the place of Livery made of the Church it self: as it is said by *Cook* in the first part of his Institutes, 46. & 335. And *vid.* 49. E. 3. 60. 6. H. 7. 14. That in antient times the Patrons upon vacancy conferred the Church unto and upon the Incumbents, without Admission, Institution and Induction, by these words onely, *Accipe Ecclesiam*, which was called the Patrons committing

5 H. 7. 37. 32 H. 6. 25.

11 H. 6. 4. by Martin.

43 E. 3. 1. 6 H. 7. 3.

Cook 1. part, Institut. 46.

mitting of the Church to the Incumbent.

CHAP. VIII.

Of Advowſons, Appendants, and in Groſs; To what they may be Appendant, and by what and whoſe Acts they may be ſevered and made Diſappendant.

MR. *Littleton* in his Chapter of Villienage ſaith, That Advowſons are either Appendants or in Groſs; and in 5 H. 7. 9. it is ſaid, That Appendancy is evermore, or for the moſt part by Preſcription; and therefore *vid.* 13. Eliz. in *Dyer* 299. If a man brings a *Quare Impedit* for diſturbing him to preſent to an Advowſon appendant to his Mannor, he needs not in his Count for to ſhew how it became Appendant, or how the Plaintiffs turn doth commence to preſent: For that the Advowſon being Appendant, and he having title to the Mannor, it is apparent that the ſame Appendancy is by Preſcription, and doth paſs to the Mannor or Lands

5 H. 7. 9.

Vid. 13 Eliz. Dyer 299.

Vid. 15 H. 7. 29. by Fineux &c. unto which it is Appendant, unless that it be severed from the Manner by Grant, by Deed, or by a Partition, or some other Legal act.

But yet note, That Prescription cannot make a thing to be Appendant, or Appurtenant, unless the thing Appendant or Appurtenant doth agree in quality and nature unto the thing unto which they are Appendant or Appurtenant. *Vid. Plow.* Com. 168. and *Cook* 1. part, Institut. 122. acc.

8 H. 7. 24. In 1 H. 7. 24. b. in an action of Trespass where the Defendant claimed to have *Liberam Faldam*, there it is said, He must shew, that the same is Appendant to some Land; for *Libera falda* is nothing else but the Lord to have the sheep of his Tenant to fold upon his Land in the night time, for the better manuring of his Lands, which thing cannot be in Gross, but alwayes is by reason of Lands, as it was said by *Keble*, and agreed by the whole Court.

5 E. 6. Dyer 70. 8 H. 7. 4. & 5. In 5 E. 6. *Dyer* 70. 8 H. 7. 4 & 5. and in *Cook* 1. part, Institut. 122 Those things which are Appendant, must be Appendant to things which are

are of a Superior Nature, and which may have a perpetual ſubſiſtance and continuance; and therefore it is there agreed, That an Advowſon cannot be appendant unto Rents or Services which may be extinguiſhed or diſcharged, and therewith agreeth Cook 4. *Terringhams* Caſe for a Common appendant, which is of Common Right, and muſt be appendant unto arable Lands which may have a continual and perpetual ſubſiſtance for ever.

In Plow. Com. 169. & 170. Which are Incorporeal, cannot be Appendants, Fairs, Services, or other Inheritances which are Incorporeal: But an Advowſon may be appendant unto the Demeſnes of a Mannor, or unto Honours, Caſtles, or other Lands or things Corporeal which may have a Continual being, or ſubſiſtance. Plow. Com. 169, 170.

An Advowſon cannot properly, and in ſtrictneſs of Law be ſaid to be appendant to an houſe for habitation; yet in 7 E. 4. 20. in a *Quare Impedit* brought for diſturbing him to preſent his Clark to the Church, the Defendant did plead, That 7 E. 4. 20.

one

one I. was seized of an House unto which the Advowson was appendant in his Demesne as of Fee, and gave the same house with the appurtenances unto the Ancestor of the Defendant in tail, *&c.* But I take the Law to be, That the plea there must have this Construction, That the Advowson was appendant unto the Land upon which the house was built, and not to the house *quatenus* an house of habitation only: For that by a secondary means, an Advowson may be appendant to an house, or unto another Church or Chappel.

10 H. 7. 13. b. by *Keble*. 10 H. 7. 13. b. By *Keble*, If I. be seized of an house with an Advowson appendant, and afterwards the house doth decay, and fall down, I. shall have the Advowson by reason of the soil, and the Advowson shall be said to be appendant to the Land upon which the house stood.

16 H. 7. 9. by *Rede*. 16 H. 7. 9. by *Rede*, If I. have Common Advowson, or Wreck appendant to an house which after falleth down, yet I. shall have the said appendancies, because that the soil which is the substance of that to

which

which the appendance is, continueth.

18 Eliz. Dyer. 350; 351. A man was seized of the Advowson of a Vicarige, which was appendant to the Rectory of *West Bodwin*, and was attainted of Felony, which was concealed from the Crown in the time of King E. 6. The Queen afterwards granted the Rectory, *& omnia tenementa parcell. spectant. dict. Rector* to I. S. In that Case, it was holden, That a Vicarige might be appendant to a Rectory, and that by the grant of the Rectory by the Words aforesaid, That the Advowson of the Vicarige did pass unto the Grantee. 18 Eliz. Dyer. 350.

Advowson in gross is; Where an Advowson which was appendant unto a Mannor of Lands, is, either by Grant, or by Conveyance, or Deed, or other wayes severed and divided from the Mannor or Lands unto which the same was before appendant.

If a man be seized of a Mannor to which an Advowson is appendant, and by Deed granteth one acre belonging to the Mannor *una cum advocatione Ecclesiæ*, and further

ther by the same Deed giveth and granteth the same Advowson, The question in that Case was, Whether the Advowson did pass as appendant to the acre, or as an Advowson in gross; and the better opinion of the book 33 H. 8. 48. in Dyer was, that by that Grant, the Advowson was severed from the Mannor, and was become in gross; for notwithstanding that there was but one Deed; yet there being several Grants and Clauses in the same Deed (and every mans deed shall be taken strongest for him to whom the Grant is) and it was more beneficial for the Grantee to have the Advowson in gross then appendant to the acre of Land; It was holden therefore in that Case, that the Advowson did pass as in gross. But in that Case, If the whole Mannor had been granted, then the Advowson had passed as appendant, and not otherwise, or in gross.

In 48 E. 3. by *Finchden.* If a man grants the Mannor of D. to which an Advowson is appendant, and by the same Deed the Advowson of the Church of D. so as it is named in

in groſs, yet it ſhall paſs as appendant.

45 E. 3. A Fine was levied of a Mannor to which an Advowſon was appendant, by which a third part was rendred back to one for life with divers Remainders over, and ſo of the two other 2. Parts with the Advowſon of every 3. Part as aforeſaid: In that book it was debated who ſhould have the firſt avoidance, and it was holden, notwithſtanding the Diviſion aforeſaid, and the naming of the one before the other, that the perſons remained Tenants in Common of the Advowſon, ſo as if they could not agree in their preſentment, that Laps ſhould encur to the Biſhop, and there was no prerogative given to him who was firſt named, nor any prejudice to the laſt named, being by one deed, and paſſing as it were *uno flatu*, the Advowſon did remain appendant as it was before.

In 14 Eliz. Dyer. 311. in *Cromwell* and *Andrews* Caſe, If a man bargains, ſells, gives, grants a Mannor, and an Advowſon to one, and afterwards levieth a Fine, or enrolleth the 14 Eliz. Dyer. 311.

the Deed, in that Case it was holden by the Lord *Dyer*, that the Advowson did pass by the bargain and sale as in gross before the enrolment of the Deed. But notwithstanding that opinion, I do conceive That the Advowson cannot pass, unless the Deed be enrolled, and then it shall pass as appendant, and not in gross, by reason of the intent of the parties.

In 9 Eliz. Dyer, There were two Advowsons in *Illesfield. viz.* S^t. *Martins* appendant to the Mannor of *Illesfield*, and *All Saints*, which was an Advowson in gross; and the Churches by the Consents of the Ordinaries and Patrons were united; and it was agreed betwixt the parties, That the Patron of the Advowson in gross should have the first Presentment, and so they should present *alternis vicibus*; In that Case, It was adjudged, That notwithstanding that, That the Advowson of the Church of S^t. *Martins* did still remain appendant for every second Presentation, and that the Appendancy was not destroyed thereby.

43 E. 3. 35. a. In a *Quare Impedit* the Plaintiff Counted, That H. was ſeized of the Mannor of F. to which an Advowſon was appendant, and that one R. brought an Aſſize of Darrein Preſentment againſt him: and upon a Fine afterwards levied, it was agreed betwixt them, That R. did acknowledge the ſame to be the right of H. For which Conuſans H. granted that R. ſhould preſent firſt, and after that A. and then R. *alternis vicibus*. H. dyed, by which the Mannor deſcended and came to his Daughter; and the Church became void by the Death of the Clark of R. The heir of H. preſented and died, and afterwards R. died, and S. the heir of R. preſented; the Defendant pleaded, that the daughter of H. did infeoff him of the Mannor to which the Advowſon was appendant. In this Caſe Exception was taken to the Plaintiffs Count, becauſe he claimed the Advowſon as appendant to the Mannor of F. for by the Count it was proved, that the Advowſon was in groſs; for by the Compoſition by the Fine they ought to claim the Advowſon as in groſs. 43 E. 3. 35. a.

groſs. But it was ſaid by *Bolknap*, That he who brought the Aſſize of *Darrein* Preſentment did acknowledge the Advowſon to be the right of the other who was ſeized of the Mannor, and that by his acknowledgement, that the Advowſon was not of other Condition then it was before, and that by the Grants of the Preſentments back again to him, that was in his own perſon did remain in him in the ſame Condition it was before the grant, and that was that the Advowſon was appendant to the Mannor: But if he who was ſeized of the Mannor had acknowledged the Advowſon to have been the right of the other, *viz.* the Conuſee, then by ſuch Conuſance the Advowſon had been in groſs, because it had been ſevered from the Mannor by the Conuſants, and then by No grant *ex poſt facto* it could have been appendant again: and therefore the Count was holden to be good.

But Note, that in ſome Reſpect by Act in Law an Advowſon may be at one time appendant, and at another time in groſs.

13. E.

13. E. 3. Qu. Imp. 170. If a Manor be divided betwixt Coparceners, and every one hath a third part of the Mannor allotted unto them, no mention being made of the Advowſon, in that Caſe the Advowſon remains in Coparcenary and in groſs, and yet in every of their Turns it is appendant to that part which they have: which appears by the book of 45. E. 3. and Cook 1. part Inſtit. 122. 13 E. 3. Qu. Imp. 170. Cook 1. part. Inſtitut. 122.

5. H. 7. 2. A man was ſeized of four Mannors; to one of which, an Advowſon was appendant, and had iſſue four daughters, and dyed; the daughters made partition of the Mannor without making of any mention of the Advowſon; and the Mannor to which the Advowſon was appendant, was allotted to the youngeſt daughter for her part. Upon argument and debate by all the Serjants and Judges, It was reſolved, That the Advowſon upon partition was ſevered and did remain in groſs, and upon the Compoſition made that the Coparceners ſhould preſent to the ſame in their Turns; and yet in that Caſe it was holden, 5 H. 7. 2.

That if all the Sisters dye but she to whom the Mannor with the Advowson appendant was allotted, That the Advowson became appendant again to that Mannor; but because upon the Partition there was an express exception made of the Advowson, it was holden (as before is said) That the Advowson remained in Coparcenary in gross.

21 H. 6. 32. *V.* 21 H. 6. 32. and 38 H. 6. But *Quere*, the difference betwixt this Case, and the Case in 19 E. 3. *Quare Impedit* 59. For there a *Quare*

19 E. 3. Qu. Imp. 59. *Impedit* was brought; and the Plaintiff Counted, that A. was seized of a Mannor to which an Advowson was appendant, and presented and dyed, and that afterwards the Mannor descended to his two daughters who made partition of the Mannor, and that the Church was void by the death of the Clark of A, so as he having the estate of the eldest daughter ought to present, but made no mention of agreement to present by turns. *Shipwith* took exception to the Count, because the Plaintiff did suppose that the Advowson was appendant to the Mannor, whereas

whereas by the partition the Advowson did remain in gross; and the exception was disallowed by the Court, because the Advowson did remain appendant as it was before; I conceive the reason of the difference betwixt this Case, and the Case of 2. H. 7. 5. to be, because in this Case there was no particular exception of the Advowson, as in the Case of 2. H. 7. there was; *quod Nota.* 2 H. 7. 5.

As all Advowsons which are appendant unto Mannors or Lands, may be severed, and divided from the Mannors or Lands by lawfull deeds of grant and Conveyance, and also by exception made become Disappendant and in gross: so likewise may they be severed and divided by tortious and unlawfull acts, such as are Discontinuances of the Mannors or Lands, to which they were appendants: by Disseisins and Usurpations; In some of which Cases, the lawfull Patrons, (if the Church do become void) shall not present unto the Church untill they have recontinued, or entered into the Mannors or Lands;

and in other Cases they may present to the same avoidances before any Entry made, or Recontinuance of the Mannors or Lands.

3 H. 4. 8. In 3. H. 4. 8. If a man be seized of a Mannor to which an Advowson is appendant, if he be Disseized of the Mannor, and then the Church doth become void, he may present unto the avoidance before his entry into the Mannor or Lands, because by the entry, the possession of the Disseisor of the Mannor is defeated, and so every estate which he hath made of the Advowson which was appendant to the Mannor, is also defeated by *Tirwit*; and therewith agreeth the book of 9. E. 4. 39. by *Brian*, who held, that if a man be disseized of a Mannor to which an Advowson is appendant, and afterwards the Church becomes void, he may present unto the avoidance before his entry into the Mannor, and notwithstanding that the Disseisor be seized of the Mannor: For the Advowson is severable from the Mannor, and therefore he may present unto the Advowson notwithstanding that he hath not the Mannor

9 E. 4. 39. by *Brian.*

nor or Lands to which the Advowſon is appendant, *V.* 21. H. 6. 19. 32. H. 6. 33. and 14 H. 6. 16. acc. 21. H. 6. 19. 32. H. 6. 33.

But if the Diſſeiſee dyeth ſeized of the Mannor, and then the Church becomes void, in ſuch Caſe the Diſſeiſee ſhall not preſent unto the avoidance before he hath entered into the Mannor. For it is holden for a Rule in Law, that a man ſhall never be admitted to the acceſſary or appendant, where he hath no right unto the principal, and his right in that Caſe is bound by the Diſſent: See to that purpoſe Cook 1. part. Inſtitut. 349. Where it is ſaid, that the iſſue in tail ſhall not be remitted to Inheritances regardant, appendant, or appurtenant upon a diſcontinuance made of them, before he hath recontinued the Mannor or thing to which they were appendant, appurtenant, or regardant: But if a man be remitted to the principal, he ſhall be remitted unto the acceſſaries.

In 17 E. 3. 3. & 13. in *Greenvill* and *Rayles* Caſe it was holden, that if Husband and Wife be ſeized of a Mannor unto which an Advowſon 17. E. 3 3. & 13.

is appendant in the right of the Wife, and they present, and afterwards the Husband alieneth one acre of the Land with the Advowson to I.S. in Fee, the Church doth become void, and I.S. doth present and afterwards dyeth, and his heir doth enter into the acre, and then the Church doth become void again; That the Wife shall not present untill she hath recontinued the Land by her *Cui in vita*, because the Advowson was appendant to the acre: But if the Advowson had been severed from the acre and been in gross, as if I.S. or his heirs had aliened the acre except the Advowson which made it in gross, and then the Husband had died, and the Church had become void, then the Wife might have presented to the same avoidance; and if she had been disturbed, she might have had a *Quare Impedit*. But *Quere* of that Case; For that now by the Statute of 32 H. 8. cap. 28. The Wife may present before she recontinueth the Lands, because no alienation of the Husband shall be prejudicial to the Wife.

Stat. 32 H. 8. cap. 28.

In

In 8 R. 2. *Quare Impedit.* 199. A. *Quare Impedit* was brought, and the Plaintiff Counted, That I. S. was ſeized of an Acre of Land to which an Advowſon was appendant, and preſented one B. who was admitted, Inſtituted and Inducted; and that afterwards I. S. gave the acre of Land with the Advowſon to the Plaintiff, and that the Defendant did uſurp upon the Plaintiff by preſenting of one F. to the Church which was void, and that the Plaintiff entered into the acre, and that the Church then became void again; The Defendant made a title to the Land before the Plaintiff had any thing therein, and traverſed the Diſſeiſin and Uſurpation alledged; In that Caſe, It was holden by the Court, That becauſe the Plaintiff who was diſſeized, had entered into the Mannor of which he was diſſeized, that the Advowſon was re-continued again in him which was ſevered by the Uſurpation, and that he might preſent. 8 R. 2. Qu. Imp. 199.

19 H. 6. 30. In a *Quare Impedit* the Plaintiff counted, that his Grandfather was ſeized of a Man- 19 H. 6. 30.

nor to which an Advowson was appendant in tail; and aliened two parts of the Mannor with the Advowson in Fee, and that afterwards the Alienee granted the Advowson to a stranger, and that his Father brought a *Formedon* of the two parts, and recontinued the Land; and Exception was taken to the Count by *Yelverton*, because the Plaintiff did not shew the Deed of Grant, nor pleaded the same; But the Exception was disallowed by the Court, because the Plaintiff claimed in *per formam doni*. Another Exception was taken to the Count, for that the Count was *jus duarum partium Manerii, &c. & advocatio prædict.* did descend to him; & that could not be; for it could not be that the Advowson did descend to him in possession; For that the two parts of the Mannor to which the Advowson was appendant, came to him as heir to his Mother, & that the Father had aliened as aforesaid, and that after his alienation he presented in the right of his Wife, which was a Remitter unto the Wife as to the Advowson; wherefore the Plaintiff mended his Count, *viz.*

Quod

Quod jus duarum partium & advocationis prædict. did deſcend; In which Caſe it was agreed, that by the bringing of the Formedon the Land was recontinued in the iſſue in tail, and ſo the Advowſon reveſted again in him, and appendant again to the two parts of the Mannor, which was ſevered by the Grant and Uſurpation aforeſaid.

14 H.6.16. a. It is agreed by the whole Court, That if a man be ſeiſed of an Advowſon appendant; and is diſſeiſed of the Mannor to which the Advowſon is appendant: and the Diſſeiſor preſents, and afterwards the Diſſeiſee doth enter upon the Diſſeiſor, and then the Church doth become void again, and the Diſſeiſor doth diſturb him to preſent, that he ſhall have a *Quare Impedit* againſt him: But otherwiſe it is of an Advowſon in groſs, that he hath no remedy but a Writ of Right: *So* note the difference; and the reaſon is, becauſe when he entreth into the Mannor to which the Advowſon is appendant, the poſſeſſion of the Diſſeiſor is utterly defeated: and therewith agreeth 14 H.6. 16.a.

24. H. 8.

24 H. 8. 8. Dyer. 4. where it is ſaid, that the Diſſeiſee of a Mannor to which an Advowſon is appendant, cannot preſent after a Diſcent, till he hath recontinued the Mannor to which the Advowſon is appendant; but before a Diſcent his entry is Congeable, and therewith agree the Books before cited, *viz.* 5 H. 7. 35. Cook 3. part, the Marqueſs of *Wincheſters* Caſe. Cook 1. part, Inſtitut. 661.

6. H. 7. 35. Cook 3. part, Marquets of *Wincheſters* caſe.

Cook 1. part, Inſtitute 363. Cook 1. part, Inſtitut. 363. b. If the Patron of an Advowſon be Outlawed, and the Church doth become void, and a ſtranger doth uſurp, and preſenteth his Clerk to the avoydance, & the ſix moneths do paſs, and afterwards the King being entituled to the avoydance by reaſon of the Outlawry brings a *Quare Impedit* againſt the Incumbent who is in by wrong, and removes him; By this means, the Advowſon is recontinued again to the Rightfull Patron, of which he was Ouſted by the Uſurpation; and if he doth reverſe the Outlawry, and the Church doth become void again, he ſhall preſent.

In

In 18. Eliz. in the Common Pleas, it was adjudged, That if a man have three avoydances granted unto him of one Church at one time, and by one Deed; and the Church doth become void, and the Grantor uſurps upon his Grantee, and preſents his Clerk to the Biſhop, who is admitted, Inſtituted, and Inducted; and afterwards the Church doth become void again, The Grantee ſhall preſent to the ſecond avoydance, becauſe the firſt preſentation made by the Grantor, did not put the Grantee out of poſſeſſion of all the avoydances.

CHAP. IX.

Of the Incidents to an Advowſon; And firſt of Preſentation, And the difference betwixt Preſentation, Nomination and Collation.

HAving in the former Chapters declared generally What Advowſon is; It is requiſite now that we take into Conſideration the particular

ticular parts thereof; It is first therefore to be known, That Presentation is the Principal Incident and Chiefest Quality to an Advowson; Which considered in it self, is nothing else but the nomination of a fit person to the Bishop or Ordinary of the Diocess to be admitted, Instituted and Inducted unto the Church or Benefice which is void.

Nomination, Presentation and Collation are *Synonima*, are commonly taken in Law for one thing and are of one sence, as it is said, 14 H. 7. 22. by *Kingsmil*, wherewith agreeth 17 E. 3. 64. b. and yet they are sometimes distinguished in respect of the persons; And therefore if one man hath the Nomination of a Clerk to a Church or Benefice which is void, it hath been holden adjudged in our books, *viz.* 24. E. 3. 39. 1. H. 5. 1. & 2. 14 E. 42. b. 21 H. 6. 17. a. and other books, That he that hath the Nomination is the Patron of the Church, and shall maintain a *Quare Impedit* in his own Name, *præsentare ad Ecclesiam*, and that which the Presentor doth, he doth but as servant to

14 H. 7. 22. by Kingsmill.

V. Plow. Com. 529.

to him who hath the Nomination; & *vide* If an Abbot hath the Preſentation, and another the Nomination to a Church which is void, and the Abbot ſurrendreth to the King; He that hath the Nomination ſhall have all; for the King ſhall not preſent for him, it being a thing undecent for the King to do any thing as ſervant to another, as it was holden by the whole Court, 1. Car. in the Kings Bench, in *Dickenſon* and *Greenhows* Caſe: and *V.* 14 H. 4. 11. in a *Quare Impedit*, where the Writ was, *Quod permittat Nominare ad Eccleſiam*, and by the opinion of the whole Court, the Writ was abated, for that there is no ſuch form of Writ; but it ought to be, *Quod permittat Præſentare ad Eccleſiam.*

Mic. 1. Car. B. R. *Dickenſon* and *Greenhows* Caſe. Paphan, 155.

This Preſentation, or Nomination, (call it which you will) is but in effect the offering of a Clerk unto the Biſhop, or Ordinary, to be by him admitted and Inſtituted into the Church: It is not properly in it ſelf a Deed: but it is an Inſtrument in the Nature of a Letter Miſſive, directed to the Biſhop, and is but the Patrons Commendations of

of a Clark to be Instituted into the Church: which Missive or Commendatory Letters, are usually in this or the like form, *viz.*

Reverendissimo in Christo patri, & Domino, Domino W. permissione divina Eboracensi Archiepiscopo, Angliæ Primati, & Metrapolitano, ejusve in absentia Vicario suo in rebus spiritualibus generali. Prænobilis T. B. Baro de P. verus, & indubitatus Patronus Rectoriæ Ecclesiæ parochialis de H. salutem in Domino sempiternam: Ad Ecclesiam Parochialem de H. prædict. vestræ Diocesis modo per mortem T. R. ultimi Incumbentis ibidem vacantem, & ad meam Presentationem pleno jure spectantem, dilectum mihi in Christo T. H. Sacræ Theologiæ Professorem Paternitati vestræ Presento (or *Commendo*) *humiliter supplicans ut præfatum T. H. ad dictam Ecclesiam admittere, ipsumque in Rectoriam ejusdem Ecclesiæ institui, & induci facere cum suis juribus & pertinentiis universis, cætaraque omnia & singula peragere & adimplere in hac parte quæ ad vestrum munus Episcopale pertinere videbantur dignemini cum favore: In cujus rei, &c.* This Presentation

sentation, Nomination, or Commendation, may be as well by Word, as by Writing, both in the Case of the the King, and of a common person.

In 11. Jac. in the Court of Common Pleas it came in Question, Whether that a Presentation made by the King unto an Advowson appendant to a Mannor parcell of his Dutchy of *Lancaster* under the Great Seal of *England* was good or not: & whether the same ought not to have been under the Seal of the Dutchy: it was Resolved in that Case by the whole Court, That the Presentment was well made; For that the Presentation was but the Kings Commendation of his Clerk to the Ordinary, and was not an interest of the Inheritance of the Advowson, but only that it was a thing concerning the Advowson, & but as a flower fallen from the stock, which did not now participate of the Root: and also for that the King might have presented by word only. And there, the Case between the King and the Bishop of *Chichester*. Mic. 8. in Jac. in Cook B. was affirmed for Law, That where the King had an Advowson in the right of

Mic. 11. Iac. in Co. B. The King and the Bishop of *Lincolns* Case.

32 H. 6. 21, 22. acc.

29 E. 3. *Qu. Imp.* acc.

Tr. 8. Jac. C. B. The King and the Bishop of *Chichesters* Case. Cro. 2. part, Reports 247.

of his Ward, and presented to the Avoydance under the Great Seal, that the same was well made, although it was not under the Seal of the Court of Wards, for that the King might present by Word only; and his Presentation was but by his Commendation of the Clerk to the Bishop to be instituted into the Church. And *Stephen Gardners* Case was then and there vouched by Cook Chief Justice, where the Presentation of *Stephen Gardner* to the Deanery of *Norwich* was good, although the King in his Presentation did mistake and misrecite the Name of the Foundation of the Deanery, because that his Presentation was but his Commendation of the Dean, and did not touch the Inheritance of the Deanery: and *V.* Mich. 3. Car. in the Kings Bench, *Stephens* and *Potters* Case: Cro. 1. part, Rep. 70. & 71. adjudged accordingly.

Pasc. 15. Car. In B.R. *Nelsons* and *Hamptons* case.

Pasc. 15. Car. in the Kings Bench, the Case was, A. and B. his Wife presented to a Church, to which they had no right: the Husband dyed: the Question was, Whether that the Presentation did gain any thing to the

the Wife: It was adjudged in that case it did not, for that the Presentation was but a Commendation, and the act of the Husband only, and it was not like an entry into Land by them.

If the Lord present his Villein to the Church of D. which is void, it is no Enfranchisement or Manumission of him, as it was adjudged Mic. 8. Jac. in the Common Pleas in *Waters* Case; and so if the Lessor present his Lessee for years to an Avoidance of a Church, the same is no Surrender of his term for years, although that the Lessee doth accept of such a Presentation; as it was also adjudged in one *Topsfields* Case in the time of Queen *Elizabeth*: For that Presentations are but Commendations, which are things revokable, and are not of any value; and therefore they shall not be Assets to Executors: And therefore, If a Church doth become void in the time of a Bishop, and so remaineth void till his death, the King shall present to the same avoidance, and not the Executors or Administrators of the Bishop.

Mic. 8. Jac. C. B. *Waters* Case

Thus you see, What Presentation or Nomination considered in it self, and as a fruit fallen, and *pro hac vice*, of what force and estimation it is in the Eye and Judgement of the Law: But then, if you Consider it again as a Right, it is an hereditary Quality incident to the Advowson or Patronage of some value, esteem and benefit to the Patron, the same being a Power in him to prefer and enable his friend to a Benefice, of which the Patron himself perhaps is not Capable; In which Presentment if he be disturbed, he shall have and maintain a Writ of *Quare Impedit*, in which he shall recover his Damages, as I have said before.

CHAP

CHAP. X.

Who may Present to Benefices with Cure: What Persons are Capable of Presentations: And what are Causes for the Ordinary to refuse the Clerk Presented; Where he must Certifie the Causes of his Refusal: and where he must give Notice thereof: where not.

HAving in the before going Chapter set forth, what Presentation or Nomination is; It doth necessarily follow, that I briefly declare unto you, 1. Who may be Patrons to present to any Church, or Chappel, or Benefice with Cure of Souls: 2. What persons are Capable of such Presentations; what not. And for what Causes the Ordinary may refuse the Clerk presented. 3. To whom, and at what time the Presentation must be made, and to whom Lapse shall encurr for want of Presentation.

For the first, An Alien Born, shall not present to any avoidance of a

Church in his own Right: But in Case that such Alien doth purchase an Advowson, and the Church doth become void, after Office found that he is an Alien, the King shall present; But an Enfant may present in his own Name and Right; and if he doth not present within six moneths after the Church shall fall void, *Latchesse* shall be imputed unto him.

33. E. 3. *Qu. Imp.* 46.
4 E. 4. 4.
8 H. 6. 5.
17 E. 3. 9. acc.

If a *Feme Covert* hath title to present to a Church which is void, she cannot present by her self; but her Husband shall present; It hath been a Doubt, if the husband might present in the right of his Wife, without the Wife: But *V.* 28. H. 6. 8. *Quare Impedit* 85. where it is resolved, That the presentment must be by the Husband and Wife in both their names, and not by the Husband in his right, and in the Right of his Wife.

28. H. 6. 8. *Qu. Imp.* 65. adjudged.

But the Wife of the King, is as a *Feme Sole*, and is as it were a person exempt from the person of the King; (although in many Cases she shall participate of the Prerogatives of the King) and is of ability of her self, either to Grant, or to pre-

V. 18. E. 3. 2.
20 E. 3. 27 b
21 E. 3. *Qu. Imp.* 46.
3. H. 7. 14. acc.

preſent to any Church which is void, which doth belong unto her, with out the King: And therefore in a *Quare Impedit* brought by her Plenarty upon the Preſentation of another, is no plea, nor barr againſt her, no more then it is in the Caſe of the King: *V.* alſo 31. E. 3. 32. b. where Plenarty is no good plea againſt the Lord, who entreth within the year for an Alienation in *Mortmain.*

V. 18. E. 3. 32. 24. E. 3. 35. acc.

31. E. 3. 32. b.

If a Villein purchaſeth an Advowſon, and the Church doth become void, the Lord ſhall preſent, becauſe the Lord upon ſuch purchaſe made by his Villein, may come and claim the Inheritance of the Advowſon; and upon ſuch Claim; the Intereſt of the Advowſon ſhall be veſted in the Lord; and upon the avoidance of the Church, the Lord in his own Right ſhall preſent to the avoidance.

The Guardian in Socage ſhall not preſent to an Avoidance of the Church in the right and name of the heir; becauſe he cannot account for the Avoidance; For he cannot make any profit thereof: for that

8. E. 2. tit Preſent 10. 7. E. 3. 39. 25. E. 3. 5. 27. E. 3. 79. acc.

would be Symonie, and so make his presentment void. Neither shall the Patron in a Writ of Right of Advowson alledge Explees, or taking of the profits in himself, but must alledge them in the Incumbent. Yet b. 14. E. 3. tit. Darrein Presentment 9. where it is said by *Birry*, That he hath seen the Guardian present in the name of the heir, with which agreeth the opinion of *Green*, in 20. E. 3. Darrein Presentment. But *Quere* of it: For the Books (as I conceive) must be intended of a Guardian by Knight Service, and not of a Guardian in Socage. But see 42 E. 3. tit: *Quare Impedit* 130. where it is said and agreed, that the presentment made by the Guardian in the Name of the heir, is a good title for the heir in *Quare Impedit* brought by him.

7. E. 3. 63.
21. E. 4. 1. b.

Men Outlawed, or Excommunicate may present, and their Presentations shall stand good untill such time as they be avoided: And generally, all persons who have abilities to grant, or to purchase, have abilities for to present unto Benefices

with

with Cure of Souls, when the Churches do become void.

Secondly, No person whatsoever is Capable to be presented unto a Benefice with Cure of souls which is void, but such a person as is *infra sacros Ordines*, or an Ordained Minister, and is also of the age of twenty three years; Nor is any Lay-person whatsoever to be presented unto any Benefice with Cure of Souls: But Spiritual and Ecclesiastical persons, (although that they be Aliens born) are Capable of Benefices with Cure within the Realm of *England*.

There was an Old Statute, That no Frenchman, although he was made a Denizon, should be presented unto any Church, or Benefice within the Realm of *England*. This Statute was made in the time of War betwixt the Realms of *England* and *France*; but that Statute is not now in force; But yet *N.* That if the King doth present any one to an avoidance, contrary to an express act of Parliament, his presentment is void, as it was adjudged, Mic 8. Jac. in Co. B. in *Walers* Case.

N. St. 13. R. 2. Raftek title, France 11.

N. Stat 1 H. 5. cap. 1.

Mic. 8 Iac Co. B. *Walers* Case.

A man was *Ante Natus*, born in *Scotland* before the Union of the two Realms: yet he was Capable to be presented unto a Benefice in *England* which was void, as it was adjudged, Mic. 8. Jac. in Co B. in Doctor *Seatons* Case: And so it was said it was if he was born in *Flanders*, *Spain*, or within any other Kingdom Friend, and in League with the King of *England*, he was Capable of a Benefice, or Ecclesiastical Dignity in *England*, as was the Bishop of *Spolettoes*, who was preferred to the Deanery of *Winsor*, and enjoyed the same; and it was said, that such Incumbent should maintain any Action real, personal, or mixt, for any thing concerning the Gleabe or the possessions of the Church, as Prior Aliens might have done: for although he be an Alien born out of the Kings Dominions, yet he bringeth his Action not in his own right, but in the right of his Church, not in his natural, but in his politick capacity, and therefore the Action will lye.

Cook 1. part, Instit. 120. 40. E. 3. 10.

If a Clerk be by the Patron presented to the Bishop to a Church which

which is void, and the Bishop doth refuse to admit or institute him to the Church or Benefice, the Bishop must shew the particular cause why he refuseth him; and he must not shew generally, That the Clark Presented unto him is unfit, uncapable, criminous, or unable to serve the Cure, but must certifie the particular inability, crime or incapacity.

Vide 38. E. 3. 2. in the Earl of *Arrundells* Case.

A. seised of the Mannor of D. to which an Advowson was Appendant, the Church became void, and A. presented I. *S.* to the Bishop, Ordinary of the place, who refused to admit him into the Benefice; and thereupon A. brought a *Quare Impedit* against the Bishop, who pleaded, That upon his Examination of the said I. *S.* he found him to be *Schismaticum inveteratum*, and for that cause by the Laws of the Church to be *personam inhabilem & minime idoneam ad occupandum aliquod Beneficium cum cura animarum*; by reason whereof he refused for to admit him into the Benefice: In this case it was adjudged by the whole Court of Common Pleas, and afterwards affirmed upon a Writ of Errour brought in

Cook 5. part. 58 Specons Case.

in the Kings Bench, That the plea of the Bishop was insufficient, because he shewed generally that he was *Schismaticus inveteratus*, which was altogether uncertain, and the especial crime or cause of his refusal ought to have been alledged by the Bishop, that the party might make answer thereunto, and so either Traverse the Cause, or take Issue thereupon.

5. Eliz. Dyer. 248. In 9. Eliz. *Dyer* 254. The Bishop of *Norwich* refused to admit a Clark who was presented unto him, because he was a common haunter of Taverns and a player at unlawful Games: And in that case it was adjudged, That they were no sufficient causes for his refusal; for although that they were offences which were prohibited by the Laws of the Realm, as to some persons, and at certain times, and so *Mala prohibita*; yet were they not crimes which were *Mala in se*, for which only a Clark ought to be refused, or to be deprived if he were admitted. And *vid.* 14. H. 4. 28. if the Patron Presenteth one, and the Bishop upon enquiry finds, That he hath a Plurality, that is no cause, for his

14. H. 4. 28.

his refusal of the Clark, because it is at the peril of the Incumbent himself if he keep the living two Moneths, that both his Benefices shall be void. But that is nothing as to the Bishop; but if the Clark Presented be Miscreant, Turk, Jew, Heretique, Schismatique, Perjured person, Bastard, Villeine, Out-lawed, Illiterate, or a meer Lay-man, these are good causes for the Bishops refusal of him, so as the Bishop upon his refusal, did express the Crime, or the certain cause of his refusal, by a Certificate made by him: And note, That Mich. 7. Jacobi, in the Kings Bench in *Austyns* case, it was resolved by the whole Court, That whatsoever are sufficient causes of Deprivation of an Incumbent who is in the Church, the same are sufficient causes likewise for the Bishop or Ordinary, not to admit a Clark Presented to him to a Benefice. But if the Ordinary shall refuse the Clark presented unto him for any of the causes before alledged, he must give notice unto the Patron of such his cause of refusal of him, to the end that the Ordinary may Present another fit Clark unto the same Church;

14. H. 4. 18.
38. E. 3. 2.
5. H. 7. 19.
11. H. 7. 7.

22. H. 6. 16.
15. H. 7. 8.
12. Eliz. Dyer. 293.
1. H. 7. 9.

Church; For if no notice be given; and the six Moneths pass, the Lapse shall not run to the Bishop or Ordinary, for that he shall not take advantage of his own wrong in not giving notice thereof to the Patron.

15. Eliz. Dyer. 327.

Thirdly, The Presentation or Nomination of the Clark to have the Benefice or Church which is void, must be unto the Bishop of the Diocess, who is the Supervisor, (and generally, or for the most part) is Visitor of all the Churches within his Diocess, for the better ordering and governing of the same: He is called Ordinary, because he hath Ordinary Jurisdiction in all Cause which are *Ecclesiastical* immediate to the King, for the doing of Justice within his Diocess, *in jure proprio, & non per Deputationem*: It is his care to see, That the Church be provided of an able and sufficient Curate, to officiate there, *Habet enim curam Curatorum*, to see that Divine Service be said, and to compell them to do it by Ecclesiastical Censures: And therefore all Presentations are made to the Bishop or Ordinary of the Doces where

where the Church is void: But in the time of the vacancy of the Bishops See, or if the Bishop be *in remotis*, about the affairs of the King or State, then the Presentation must be made to the Guardian of the Spiritualties, (which commonly is his Dean and Chapter) or to the Vicar General which supplieth the room and place of the Bishop. And therefore *vid.* 22. H. 6. 29. by *Paston* and *Ascough* Justices, it is said, That if a Bishop maketh a Guardian of the Spiritualties, and then goeth beyond Sea, for any the causes aforesaid, and the Patron doth Present his Clark to the Guardian of the Spiritualties, in the absence of the Bishop, and he refuseth to admit him into the Benefice or Church with Certificate of sufficient cause of such his refusal, that the Patron in such case may have and maintain a *Quare Impedit* against the said Guardian of the Spiritualties. 7. H. 4. 31. 17. E. 3. 23. b. Fitz. N. B. 93. acc.

If a man doth recover and hath Judgement given for him, in a Writ of *Quare Impedit*, and afterwards the Bishop who is ordinary of the Diocess, dyeth before that the Clark of

of the Plaintiff be admitted to the Benefice or Church, the Writ to admit the Clark of the Plaintiff must be directed unto the Guardian of the Spiritualties, *sede vacante*, to give admission: But if before the Writ of Admission to him directed be executed, another man be Created and Consecrated Bishop of that See, and Power of the Guardian of the Spiritualties doth then cease, and the party who recovered in the *Quare Impedit*, may have another Writ unto the Bishop to admit the Clark if he please: But see 38. E. 3. 12. That if the party taketh out in such case a Writ to the Metropolitan to admit his Clark, (where it should have been to the Guardian of the Spiritualties, or to the Vicar General) he cannot afterwards wave it, and have another Writ to the Vicar General, *&c.* but a *Sicut alias* to the Metropolitan.

18. Eliz. Dyer. 350.

38. E. 3. 12.

As the Presentation, or the Presentment must be made unto the Bishop or Ordinary of that Diocess where the Church is void, or else unto his Guardian of the Spiritualties, or Vicar General in all cases, as before is said, so also must it be made with-

in convenient time, to prevent a Lapse.

CHAP. XI.

Within what time a Presentation must be to avoid Lapse: And where Lapse shall incurre for want of Presentation within six Moneths. How the six Moneths shall be accompted; And who shall Present for Lapse.

THe Law hath appointed six Moneths to the Patron to Present his Clark unto the Bishop or Ordinary: But if the Patron doth not Present his Clark accordingly, then shall the Lapse run to the Bishop or Ordinary, and he shall Present for the default of the Patron, a Clark of his own chooſing; and his Presentation is called in Law Collation. And if the Bishop or Ordinary shall surcease his time, and shall not Collate within the six Moneths to him allotted, then the Metropolitan, the Archbishop of the Province, shall Collate his Clark to the Church.

And

And if he also doth not Collate within other six Moneths, Then shall the King as Supream Ordinary of all the Dioceſſes and the Benefices in *England*, Preſent his Clark to the Church, being yet void: But there is notwithstanding great care to be had, and it is to be known, how, and after what manner the Church doth become void, for that accordingly the six Moneths shall be accompted.

If the Church shall become void by the Death of the Incumbent, then the six Moneths shall be accompted from the time of his Death; of which the Patron is at his peril to take notice, and to make his Preſentment unto the Biſhop or Ordinary accordingly; and so is the Law taken to be, if the Church doth become void by Creation, *viz.* by making the preſent Incumbent thereof a Biſhop, or by Ceſſion, whereof the Patron is at his peril likewiſe to take notice: But if the Church doth become void by Reſignation (which is the act of the Incumbent himſelf, and which Reſignation of neceſſity muſt be made to the Biſhop or Ordinary) or by Deprivation, which is

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the act of the Law, there although the ſix Moneths do encurre before the Patron preſents, yet the Biſhop or Ordinary ſhall not Collate, unleſs the Biſhop or Ordinary, upon the Reſignation or Deprivation had given notice unto the Patron of ſuch Avoydance of the Church: For in ſuch and the like caſes, the ſix Moneths ſhall be accompted from the time of the notice given to the Patron by the Biſhop or Ordinary of the Reſignation or Deprivation: But if the Church doth remain void by ſix Moneths after the death of the Incumbent, without any Preſentation made to the ſame by the Patron; Or by ſix Moneths after ſuch time that the Biſhop or Ordinary hath in the caſe of Reſignation or Deprivation given notice thereof unto the Patron, and the Biſhop or Ordinary doth Collate his Clerk by reaſon of the Lapſe devolved unto him, and before the Clerk be Inducted, the Patron doth preſent his Clerk to the Biſhop, the Biſhop may refuſe to admit the Clerk of the Patron to the Church, for that the title to Collate was rightfully and lawfully come to

Vid. 18 H. 7. 49. in Kelloway. 5 E. 4. 3.

16 Eliz. Dyer 317. 13 Eliz. Dyer 295. 1 H. 7 9. 50 E. 3. 3. acc.

22 H. 6. 26. acc.

the Bishop. And note, That both for the notice, and to whom and where it is to be given; *viz.* that if the Patron doth Present his Clerk to the Bishop, and the Bishop doth refuse to admit his Clerk for any of the Causes before mentioned, That of such his refusal he is to give notice to the Patron himself if he be resident within the County where the Church is; but if he be not within the County, then the notice of such his refusal is to be left at the Church it self, as it was adjudged, Trinit. 27 Eliz. in Co. B. *Albany* and the Bishop of St. *Asaphs* case.

Vid. Albany and the Bishop of St. *Asaphs* Case. Tr. 27 Eliz. C. B. Leon. 1. part, Reports, Sect. 39.

If the Church be void, and the Patron doth Present his Clerk to the Ordinary, who refuseth to admit him untill he hath examined him of his ability; and a moneth or two after the Presentment, upon Examination the Clerk Presented is found to be criminous, or unable to serve the Cure, and afterwards Lapse encurreth, the six Moneths shall be accompted from the time of the Avoydance; and if the Patron be a Lay person, the Ordinary shall give notice unto him of the inability of the Clerk;

14 H. 7. 22.

18 H 7. 39. in Kelloway. 5 E. 4. 4. 8 E. 4. 2.

Clerk; but otherwiſe it is if the Patron be a Spiritual perſon, and the Clerk be criminous or unable.

If the King be Patron, and doth not Preſent his Clerk to the Church within ſix Moneths, there the Ordinary ought not *de jure* to Collate in regard of the ſaid Lapſe: He onely ought for to ſequeſter the profits of the Church till the King will Preſent. But in ſuch caſe, if notwithſtanding the Ordinary doth Collate his Clerk to the Church, and afterwards the King doth Preſent his Clerk to the Ordinary, the King in ſuch caſe ſhall not remove and put out the Clerk Collated by the Ordinary, without a *Quare Impedit* firſt brought.

Vid. 14 H. 7. 21. by Keble Br. Title Preſentment, 24.

But in all caſes before ſaid, The ſix Moneths ſhall be accompted according to the Kalender, and not according to twenty eight dayes to the Moneth: For that the words (*Tempus feneſtre*) in the Statute of Weſt. 2. cap. 5. ſhall have ſuch conſtruction as ſhall be for the relief of him who hath right, and to give him the longeſt time that may be, that he loſe not his right. *Vid.* to that pur-

pose, *Cook* 6. part, *Catesbies* case; with which agreeth 5 E. 3. *Rott.* 100. *Memb.* clause in the Tower, which see vouched in *Dickenson* and *Greenhams* case, in *Pophams* Reports 137.

If the King hath title to Present by Lapse, for the default of the Ordinary and Metropolitan, and notwithstanding the Kings title, the Patron doth present his Clerk, who is Admitted, Instituted and Inducted by the Metropolitan; this shall bind the King, and the King cannot remove the Incumbent without a *Quare Impedit* brought: For by the Induction the Church was full; and although the six Moneths were not incurred, and *Nullum tempus occurrit Regi*; yet in that case he shall not present or remove the Incumbent but by a *Quare Impedit* brought against him.

14 H. 7. 21. *per Curiam.*

If a man be Tenant by the Curtesie of a Mannor to which an Advowson is Appendant, and the Church doth become void by Resignation, and then the Tenant by the curtesie dyeth, and the Mannor is seised into the Kings hand; in such case, although that the Heir be now of full age, yet the King shall

12 E. 3. *Qua. Imp.* 159.

ſhall have the Preſentment, as it was holden in 12 E. 3. *Fitz. Quare Imp.* 159.

If the Kings Tenant be ſeiſed of an Advowſon and Preſents, and afterwards the Church doth become void, and the Tenant dyeth, and the King ſeiſeth the Advowſon, if the Advowſon did become void in the life of the Tenant, and ſix Moneths paſs, and the Ordinary noth not preſent for Lapſe in the life of the Tenant, the King ſhall Preſent; for by the ſeizure he was ſeiſed, and then *Nullum Tempus occurrit Regi. Vid.* to that purpoſe 6 E. 2. *Fitz.* Preſentment 9. 18 E. 3. 21. 18 E. 3. 21.

A man held Lands of the King, and a Mannor and Lands to which an Advowſon was Appendant of a common perſon, and dyed, and the Advowſons were ſeiſed into the Kings hands, and afterwards the Church did become void; and after it was found, that the Tenant was but Tenant for life of the Advowſon, and made Livery of the Lands *cum exitibus*; In that caſe it was holden by the whole Court, That by the Livery the Advowſon did not paſs out of 24 E. 3. 27. 27 E. 3. 82. acc.

the King; And in that case the King had a Writ to the Bishop to admit his Clerk to the Church.

CHAP. XII.

Where the King may revoke or repeal his Presentation, where not: And where a Common person cannot revoke, or vary from his first Presentment.

39 H 6. 19.
14 E. 4. 3.
20 H. 6. 19.

IT hath been a Question much Controverted in old Books, Whether, if a Common person hath once presented his Clerk to the Ordinary, if he may Revoke the same, or Vary from his first Presentment? But the better opinion of the Books hath been, That a Common person cannot revoke or repeal, or vary from his first Presentment, because he hath put it out of himself, and hath given to the Bishop power to perfect what was by himself begun. But if the King do present to the Church, and his Clerk be admitted and instituted; yet the King may before Induction repeal, or revoke his first presentment, by his present-

V. 31 E. 3. Qu. Imp. 185.
38 E. 3. 35.
17 Eliz. Dyer 348.
V. Bacons Maxims acc.

V. 7 E. 32.
23 Eliz. Dyer. 360.
13 Eliz. Dyer. 293.
Cook 1. part, Instit. 360.

preſentment of another Clerk to the Biſhop.

In 25 E. 3. 47. The Caſe was, the King brought a *Quare Impedit* againſt the Biſhop of *York* of a Prebend in the Church of S^t. *Peter* in *York*; and ſhewed, that the Predeceſſor of the Biſhop preſented one N. and that afterwards the Predeceſſor dyed, and the Temporalties of the Biſhoprick came to the Kings hand, and they being in his hand, the Prebend became void by the death of N. The Biſhop ſaid, That after the death of N. the King preſented *Robert de Kelſey* to the Prebend, who was admitted and inſtalled by the Dean and Chapter: Which Preſentment of *Robert* was Ratified and Confirmed to the ſaid *Robert*; and ſhewed the Deed of Confirmation thereof, and ſhewed further, That the ſaid *Robert* dyed Prebendary: and ſo demanded Judgement, if the King ſhould have the Preſentment. To which it was ſaid for the King, That before *Robert de Kelſey* was admitted to the Prebend, the King did repeal the Preſentment made of the ſaid *Robert*; and ſhewed forth the Deed

Tr. 25 E. 3. 47. *Robert de Kelſeys* Caſe.

of Repeal, and the Certificate of the Chapter of the day thereof. It was adjudged in this Case, That by the Repeal, the first presentment of *Robert de Kelsey* was utterly void, so as the King had title to present, and Judgement was given against the Bishop. Note, That I do observe out of that Case, wherewith agreeth
14 E. 3. acc. the Book of 14 E. 3. That it must appear by Deed or other wayes to the Court, that the King did repeal his presentment: that otherwise the pleading of the repeal is not good; and to that purpose, *Vid.* 7 H. 4. 13. In a *Quare Impedit*
7 H. 4. 13. brought by the King, the Incumbent pleaded the Ratification of him Incumbent under the Kings Privy Seal; To which it was answered, That the same was repealed; but it was not shewed how it was repealed by Deed or otherwise; and therefore it was doubted if the pleading thereof was good or not. But note, That at this day it is holden, That the very presentment of another Clerk by the King before Induction, without any more signification, or Act done, is accounted in Law to be a repeal

repeal of the first presentment: and so was it adjudged. Mic. 8. Jac. in Co. B. in *Waters* Case. Mic. 8. Ia. C. B. *Waters* Case.

The Vicarige of *Yatton* in the County of *Southampton* came unto the Queen by Lapse: the Ordinary of the Dioces Collated A. to the Vicarige; afterwards the Queen presented B. who thereupon brought a *Quare Impedit* against the Bishop and the Incumbent, depending which *Quare Impedit* A. by Covin and fraud obtained a new presentation to the same from the Queen, without making mention of the pleasure of the Queen to repeal or to revoke her first presentment: In this Case, it was holden by the whole Court, That the second presentation in it self had been sufficient, and had been a repeal of the first, if it had not been obtained by the fraud and covin of A. And so it was adjudged in the Court of Common Pleas, Mic. 4. Jac. in the Bishop of *Bangor*, and *Williams* Case. 4o. Iac. Bishop of *Bangor* and *Williams* Case.

If the King hath Cause for to present by reason of Lapse, or otherwise, and presents I. S. to the Bishop; and before he is Instituted and

and Inducted, the King dyes, and the Succeſſor King without reciting or mentioning of the preſentment of his Predeceſſor, preſents I. D. to the ſame Church: It was in that Caſe (amongſt other points) adjudged. Mic. 8. Jac. in the Exchequer in *Calvert* and *Kitchyns* Caſe, that the very deceaſe of the King did determine the firſt Preſentation: For that the Preſentation was but a power given to the Ordinary, which was Countermandable, and revokable; and by the preſentment of him, I. S. had *neque Officium, neque Beneficium:* and further in that Caſe it was Reſolved, That the firſt preſentation was repealed, although it was not recited by the King: and was not within the Statute of 6. H. 8. cap. 15. That the King ought to recite the ſame: For it was agreed by the Juſtices, That that Statute went and extended only to Leaſes, and did not extend to Preſentations to Churches, or other Spiritual promotions.

Mic. 8. Ia. C. B. *Calvert* and *Kitchyns* Caſe.

44. E. 3. 31. b. acc.

V. 16. Eliz. Dyer. 327. acc.

CHAP.

CHAP. XIII.

Of Examination of the Clerk by the Ordinary: Of Admission and Institution, at what time and place the same may be; Where the Ordinary may refuse to admit the Clerk, because the Church is Litigious; and where Jure Patronatus *shall be awarded: Where there shall be a Plenarty by Institution. And how Plenarty and Avoidance shall be tryed.*

WHen the Patron upon the Avoydance hath presented his Clerk within six Moneths, which is the time limited by the Law, the Bishop or Ordinary is to admit and Institute the Clerk presented to the Church: But before he be admitted into the same, the Bishop or Ordinary ought for to examine him of his Ability. For if upon Examination the Clerk presented, be found to be unable to serve the Cure, or that he be criminous, as before is said, then may the Ordinary 14. H. 7. 22.

dinary or Biſhop refuſe to admit ſuch Clerk to the Church: But yet *vide* 40. E. 3. Qu. Imp. 118. If the Clerk be not of ability at the time of the refuſal of him by the Biſhop? Or if iſſue ſhall be taken upon his Ability: If the Biſhop after ſuch Iſſue joyned, doth inſtitute him to the Benefice or Church, he ſhall be adjudged to have been alwayes of Ability, and the firſt preſentation of him ſhall ſtand and be good, and he ſhall not need to have a New Preſentation.

40. E. 3. Qu. Imp. 128.

This Examination of the Clerk is to be done by the Biſhop or Ordinary at a convenient time within the ſix moneths after the Clerk is preſented unto him; For the Ordinary cannot refuſe to examine the Clerk during all the ſix Moneths, and by reaſon thereof ſuffer a Lapſe to run to himſelf; For if he ſhould ſo do, the Patron might loſe his preſentment, and the Ordinary ſhall take advantage of his own wrong in his not examining of the Clerk within convenient time: But if the Ordinary (when the Clerk comes to be examined) *ſedet circa Curam Paſtoralem,*

22. H. 6. 29. acc.

15 H. 7. 7. Mic. 15. Eliz. in Co. B: adjudged. acc.

Pastoralem, the Ordinary is not bounden to leave the Business in hand, and presently examine the Clerk, but to make an end of his other business first, and then to examine the Clerk: And the Ordinary may appoint a convenient time and place for the Clerk for to attend for the examining of him.

In a *Quare Impedit* brought by *Palmes* against the Bishop of *Peterborough*, for not admitting his Clerk to the Church, the Bishop pleaded, that he demanded of the Clerk the Presentee of the Plaintiff, to see his Letters of Orders, and he would not shew them unto him, and this he did, because he was not ascertained whether he was a Deacon or not; and he also demanded of him Letters Missive, or Testimonials testifying his Ability; and because he had not his Letters of Orders, nor Letters Missive, nor made proof of them to the Bishop, he desired leave of the Bishop to bring them, who gave him a Weeks time, but the Clerk came not again, so the six moneths passed, and the Bishop Collated for a Lapse: upon this plea of

Tr. 33. Eliz. B. R. *Palmes* and Bishop of *Peterboroughs* Case. *Vid.* Cro. 3. part, 241.

of the Biſhop it was demurred in Law, and it was adjudged for the Plaintiff againſt the Biſhop; For it was ſaid by the Court, that theſe were not Cauſes to ſtay the Admittance, and that the Clerk is not bounden to ſhew his Letters of Orders, or Miſſive to the Biſhop, but the Biſhop is to go to the Examination of him without his ſhewing of them.

If the Biſhop upon Examination of the Clerk preſented, find him to be of Ability to ſerve the Cure, and to be capable of the Benefice: then doth he admit him to the ſame, in theſe or the like words. *viz. Admitto te Habilem*: and afterwards he doth Inſtitute him unto the Benefice or Church, and giveth him his charge thereof in theſe or the like words, *viz. Inſtituo te Rectorem Eccleſiæ Parochialis de D. & habere curam animarum, & Accipe Curam tuam, & meam.* *Vide* 32. H. 6. 28. Where it is ſaid, A man may be a Parſon of a Church without his knowledge: For if the Biſhop ſay to another, *Admitto te ad tale Beneficium nomine A. B.* this admiſſion is an Inſtitution of him,

Co. 4. part. 79. 32. H. 6. 28. b. 33 H. 6. 24. acc.

It is not material, Whether the Examination, Admiſſion, or Inſtitution be made by the Biſhop within his own Dioceſs or not; For the Biſhops Juriſdiction, to ſuch and the like purpoſes, is not Local, but followeth the perſon of the Biſhop: And therefore if a Clerk be preſented to the Biſhop of *Norwich*, to a Church which is void within his Dioceſs of *Norwich*, although that the Biſhop be in *London*, or in any other place out of his own Dioceſs; yet he may there Examine that Clerk and give admiſſion unto him; for that the Juriſdiction of Biſhops, as to the making of Clerks, admitting of them, the granting of Adminiſtrations, and the like, is not Local, but followeth the perſon of the Biſhop whereſoever he is, as it was adjudged; Paſc. 27. Eliz. in Co. B. in *Carter* and *Trofts* Caſe.

Paſ. 21. Jac. in Co. B. *Knollys* and *Dobbins* Caſe adjudged. acc.

If two Joint-tenants, or Tenants in Common be of the Patronage, and they cannot agree in their preſentment, but vary and preſent ſeveral men to the Biſhop; in ſuch Caſe the Biſhop is not bounden to admit any of their Clerks; and if the

45. E. 3. tit. Preſent. 8. Dr. & Student. 116. acc.

the six moneths do incurr before they agree, the Bishop may Collate a Clerk of his own to the Church: but he cannot Collate within the six moneths; For if he do, they may agree and bring a *Quare impedit* and remove the Incumbent, for that his Collation was a disturbance. But if there be two Coparceners, and the Church doth become void; and the eldest Sister doth present, the Bishop is bounden to admit her Clerk: for that by the Law the eldest Sister shall have the first presentment, unless there be an agreement made betwixt them to present in some other manner. And *vide* 22 E. 4. 9. So it is, That the Husband who is Tenant by the Curtesie in the Right of the Eldest Sister shall first present.

34 H. 6. 46.
5 H. 7. 8.
11. H. 4. 58.
33. H. 6. 32.
21. H. 6. 45. by Ascough.
20. E. 3. Qu. Imp. 63.

If two men present one man severally to the Bishop, the Bishop cannot admit him generally to the Church: But the Bishop in the Admittance of the Clerk to be Incumbent, must admit him as Clerk and Incumbent of the presentation of one of them: as it was Resolved, Mic. 8. Jac. in the Common Pleas in

in *Danby* and *Lindleys* Case: And if they make such Presentation, claiming by several Patrons, or titles; The Bishop is to direct the Writ *de jure Patronatus*, which is in the nature of a Commission, (and may issue forth as well after the several Presentments as before) because the Church is Litigious: But the Bishop is not to award the *jure Patronatus* but at the request and prayer of the parties. But yet it seemeth by the books of 5 H. 7. 22. and by *Brian*, 34 H. 6. 38. that the *jure Patronatus* must be sued forth at the cost and charge of the Bishop, because it is for his Excuse, and so for his Advantage.

21 H. 6. 44. a.

7 E. 4. Qu. Imp. 100. Dr. & Stud. 119.

In 26 Eliz. in the Common Pleas in a Prohibition, the Case was, *Gerrard* Master of the Rolls, Presented *Chatterton* Bishop of *Chester* to the Church of *Bangor*, to which Church one J. S. also Presented his Clerk; by which severall Presentments the Church became Litigious; the Archbishop of *York* being Ordinary of the place, awarded *jure Patronatus*; depending which, the said Archbishop admitted *Chatterton* to the Church: J. S. thereupon libelled in the Spiri-

Pasch. 26 El. in Co. B. *Gerrard* and *Chambers* Case. *V.* Leon. 3 part. Reports 98.

tual Court againſt the Archbiſhop, for that he the ſaid Archbiſhop *prædicto Epiſcopo plus æquo fidens admiſit dictum Epiſcopum pendente jure Patronatus*; and now came the Archbiſhop and prayed a Prohibition, which was granted by the Court: For in this Caſe it was ſaid by the Court, That the awarding of the *jure Patronatus* is not a thing of neceſſity, but at the will of the Ordinary, and for his better Inſtruction: For if he will at his peril take notice of the right of the Patronage, he may receive which of the Clerks he will, without a *jure Patronatus*.

Dr. & Stud. 117. But if two Coparceners be of an Advowſon, and the Church void, and they ſeverally Preſent to the Ordinary, this doth not make the

33 H. 6. 32. Church to be Litigious, becauſe they claim by one title. And ſo it is, if they

22 E. 4. 4. make compoſition to preſent by turns, and one of them doth uſurp in the turn of the other, ſuch uſurpation doth not put the other out of poſſeſſion.

Vid. Plow. Com. 528. By Inſtitution made by the Biſhop, the Church is full of an Incumbent as to the Spiritualties; that is to ſay, to

to Celebrate Divine Service, to Administer the Sacraments, to Preach and instruct the Parishioners in the true Faith, &c. and in a *Quare Impedit* brought, Plenarty by Institution is a good plea against a common person, and yet the Incumbent wanteth the Temporalties by which he should live, which he hath not before he be Inducted; for upon the Induction, the Temporalties, *viz.* the Gleab, Offerings and Tythes are vested actually in him. 38 E. 3. 4.

In an *Ejectione firmæ* by the Lessee of R. Incumbent of the Church of D. the Case was, That the King was the true Patron; and one W. entred a Caveat *in vita Incumbentis*, who then lay sick *in extremis*, in this manner, *viz. Caveat Episcopus ne quis admittatur*, &c. *nisi Convocatus*; the said W. the Incumbent dyed, N. a stranger presented one M. who was admitted, instituted and inducted; Afterwards W. Presented one G. who was instituted and inducted; Afterwards R. procured a Presentation from the King, who was instituted and inducted: It came in Question in the Spiritual Court, Who had the Mich. 15 Jac. in B. R. *Rones* Case. *Popham's* Reports 133.

best Right? It was the opinion there, That the first institution was *irrita & vacua*, by reason of the Caveat; and then, the Church being full of the second institution, the Presentment of the King was void. But in this Case, it was Resolved by all the Justices of the Court of Common Pleas, 1. That this Caveat was void, because it was in the life of the Incumbent. 2. That the Church upon the institution of M. was full against all but the King: and then the Presentation of G. was void, by reason of the super-institution; and no obstacle was to hinder the Presentation of R. the Kings Presentee, and that the said R. had the best Right.

Cook 4. part, 77. in *Digbies* Case.

If a Clerk be admitted and instituted into a Benefice with Cure of Souls, of the clear yearly value of 8 *l. per an.* and before he be inducted he accepteth of another Benefice with Cure of Souls, and is inducted into the same, the first Benefice is become void by the Statute of 21 H. 8. of Pluralities; For in Judgement of the Common Law, he that is instituted into a Benefice, hath accepted of the

the same, and the Church is full within the intent of that Statute without induction; and yet the incumbent is not so absolutely Parson by the Institution, that he can then charge the Church to bind the Successor before induction. And therefore, if a Prebendary, Parson, or Vicar, after he be admitted and instituted, and before he be inducted, grants an Annuity out of the Prebend, Parsonage or Vicarige, and the same be confirmed by the Patron and Ordinary, or by the Dean and Chapter: yet this shall not charge the Gleab, or the Successor of the Prebendary or Parson: for although by the institution he hath *jus ad rem*, yet he hath not *jus in re*, but the Charge in such Case shall lie upon the Parson, and not upon the Lands.

At the Common Law, if a Stranger had presented his Clerk to the Bishop, and he had been admitted and instituted to the Church whereof a Common person was the Patron, the Patron had no remedy for to recover his Presentment, or Advowson, but by a Writ of Right of Advow- Cook 1. part, Instit. 344.

ſon, by which the Incumbent was not to be removed; and ſo it was, if an Uſurpation had been upon an *Infant* or a *Feme Covert* who had an Advowſon by Diſcent, Plenarty generally was a good plea againſt them, and the reaſon thereof was, that the Incumbent might quietly intend and apply himſelf to his Spiritual charge, and alſo for that the Law intended, that the Biſhop who had Cure of the Souls within his Dioceſs, would admit and inſtitute an able man for the Officiating of the Cure, and the Diſcharge as well of the Biſhops duty, as of his own. But yet at the Common Law, if one had uſurped upon the King, and his Clerk had been admitted, inſtituted and inducted, the King might have removed him by a *Quare Impedit*, and been reſtored to his Preſentation, by reaſon of his Prerogative, That *Nullum tempus occurrit Regi*; but he could not have preſented, neither could have removed the Incumbent any way but by Action. But this miſchief was remedied by the Statute of *Weſtm.* 2. cap. 5. which gave the *Quare Impedit* to the party notwithſtanding ſuch Plenarty, *dummodo*

modo Breve infra tempus ſemeſtre impetretur. And at this day the Church is not full by inſtitution againſt the King: For (as I ſaid before) the King at this day before induction, may Repeal and Revoke his former Preſentation, which he could not do if the Church was full of an Incumbent, as it was adjudged, 18 Eliz. in *Giles* Caſe; which Caſe is vouched in *Cook* 10 part, 133. in *Holts* Caſe.

45 E. 3. 39. 18 Eliz. Dyer 348. 25 E. 3. 47. 33 H. 6. 24. a.

18 Eliz. in Co. B. *Giles* Caſe.

24 E. 3. 31. In a *Quare Impedit* brought by the King againſt the Biſhop of *Winton* and B. the Caſe was, The Biſhop did preſent A. to the Church, who was inducted; Afterwards A. accepted of a Plurality, by which the Church became void; and afterwards the Biſhop preſented B. to the Church, who was inſtituted and inducted; the King brought a *Quare Impedit* againſt the Biſhop, and B. and Recovered, and had a Writ to the Biſhop to admit his Clerk.

24 E. 3. 31.

If the Biſhop Collate to a Church, and before induction of the Clerk, the Biſhop dyeth, and the Temporalties of the Biſhop are ſeized into the

Kings hands, the King shall Present to the Avoydance, because the Church was not full against the King till induction.

V. 5 El. Dyer 217.
21 Eli. Dyer. 313.
50 E. 3. 17. & 18.
22 E. 3. 10.

This Plenarty is a Spiritual thing, and therefore, if it come in Question, Whether the Church be full of an Incumbent or not, the same shall be tryed by the Certificate of the Bishop, who best knowes of the Institution: But if the Issue to be tryed be, Whether the Church be void or not, the same shall be tryed by a Jury at the Common Law, unless the Issue to be tryed, be upon some special act of Avoydance; for then, the same shall be tryed by the Certificate of the Bishop, so as the especial Cause of Avoydance, be Spiritual.

V. 39 E. 3. 2. If Ability of the Clerk who is dead, comes in question; and Issue be signed upon it, it shall be tryed by Jury in the County where the examination was.

CHAP.

CHAP. XIV.

Of Induction; By whom the same is to be done. How far the Parson, or Vicar upon their Inductions, may charge the Gleab: What Actions they may have for their Possessions after their Induction: And of their Payment of first fruits.

THe last thing for the making of the Clark presented, compleat incumbent of the Church, is Induction; This is usually done by the Arch-Deacon; but may be done by the Bishop himself: which is nothing else, but the putting of the Clark in possession of the Church Gleabe Lands, Tythes, Offerings, and other the Temporalties of the Church. 11 H.4.76.b; 14 H.6. Qu. Imp. 162. 11 H.4.9. 38 H. 6. 15; acc.

If the Archdeacon will not induct the Clark after such time as the Bishop hath admitted and instituted him, and directed his Letters to the Archdeacon to induct him; By the opinion of Mr. *Fitzherbert*, an Action upon the Case will lie against the *v.* F.N.B.47. h. 26.H.8.3. by *Knightly*. F.N.B.36. P.

the Archdeacon, becauſe that the Induction is a Temporal act: But others are of opinion, and ſo likewiſe
38. H. 6. 15. b. it was adjudged, Paſc. 33. Eliz. in Co. B. That a Citation ſhall be awarded out of the Spiritual Court againſt the Archdeacon, and he ſhall be puniſhed there, becauſe that the Archdeacon may alledge ſome ſpecial cauſe, for which, by the Eccleſiaſtical Law the Clark he ought not to be inducted, which cauſe may not be determined elſewhere, but only in the Spiritual Court.

38. E. 3. Qu. Imp. 135. In 38. E. 3. Qu. Imp. 135. it is ſaid, that he is not Parſon *in facto* until induction: and therefore it is ſaid there, that if a Writ of Right of Advowſon be brought, the Plaintiff ought to Count that the party was
33. H. 6. 24. a. inducted; But by the induction of him, publick Notice is given to the Pariſhioners, that he is their Parſon or Vicar who hath the Cure of their Souls: And this is alſo manifeſt unto them by his Actions, *viz.* his entring into, and taking of the poſſeſſion of the Church, Ringing of his Bells, *&c.*

4. H. 8. Dyer. 1. After he is inducted, he may by the

the Statute of 25. E. 3. cap. 7. plead any plea in barr in a *Quare Impedit* brought againſt him as poſſeſſor of the Church; As if a *Quare Impedit* be brought againſt him, he may plead a Releaſe in barr, becauſe he hath the Freehold of the Church and of the Gleab in him, which ſhall not be loſt without his Anſwer: And after he is inducted, he may maintain any Action Real, Perſonal, or mixt, for the Gleab, or any thing concerning the poſſeſſions; as if a Parſon maketh a Leaſe for life of his Gleab, he ſhall maintain a Writ *de Conſimili Caſu* during the life of the Leſſee; and a Writ of *Entre ad Terminum quem præteriit* after the death of the Leſſee: ſo may he have an Action of Waſte, for Waſte done on the Gleab Lands: But a Writ of Right for Diſclaimer, A Writ of Cuſtomes and Services, a Writ of *Ne injuſte vexes*, or other Writs which are grounded upon the meer Right, he ſhall not have, becauſe that the abſolute Inheritance of the Gleab, *&c.* is not in him: and ſo he may have and maintain any Action, Suit, or Libel which are perſonal for

8. H. 5. 9. acc.

Fitz. N. B. 49. L.

Cook 1. part, Inſtit. 341.

2. E. 4. 3: 10. H. 7. 5.

for the Tythes, or other profits of the Church detained or withholden from him in his own Name, which he could not have had, sued, or maintained before he was inducted.

V. 36. H. 8. Dyer in *Tavernors*. Case. 19. H. 6. & 21. H. 7. acc.

If a Parson, or Vicar who is inducted and compleat, make a Lease of his Gleab and Tythes by Deed, (as the same must so be) for years, the Lease is good. Yet in such Case the Parson or Vicar himself must Officiate and Serve the Cure, and not the Lessee: For that the Cure being a Spiritual Charge, and Administration doth not follow the Gleab or Tythes, but is annexed inseparably to the person of him who is incumbent of the Church.

Cook 1. part, Instit. 96. pl. 136. a.

After that the Clark is inducted by the Archdeacon, (or other who hath power to do the same,) He must Compound for the first Fruits with the King, before that he can take any of the profits of the Benefice. For if he taketh any profits before he make Composition with the King for the first fruits, he shall pay double fruits. And for the payment of the first fruits, he must be bound in a penal Obligation with Sureties,

Sureties, and upon the payment thereof, he ſhall have of the Officer of Receiver of the firſt fruits, a Bill, teſtifying the Receipt thereof; and the Obligation ſhall be delivered up to him again.

CHAP. XV.

By what Acts the Church may become void, and the Incumbent removed. And of Avoydance by Death: and Entry into Religion.

I Having ſetled the Clark preſented, a perfect Incumbent in his Spiritual Benefice with Cure of Souls, and in the poſſeſſion of the Church, and having given him ſome power therein and thereof: Let us now ſee by what, and by whoſe acts the Church may become void, and the Clark preſented may be removed and put out of his Benefice again.

The Church may become void by ſeveral Means, and Laws, *viz.* either by the Eccleſiaſtical and Spiritual Law;

Law; or else by Positive or Statute Law. And in some cases the Church shall become void by the meer Act of Law: In some cases by the Act of the party incumbent, and in some case by a Sentence given in the Spiritual Court, grounded upon the Act or defect of the party.

In all Cases, the death of the Incumbent is a present Avoydance of the Church, and therefore if the Incumbent thereof dyeth, the Church is presently void; and the Patron at his peril ought to take notice of the Avoidance, and present another Clark to the Bishop or Ordinary to be instituted into the Benefice within six moneths without any Notice to be given unto him of the Incumbents death, otherwise the Lapse shall encurr to the Ordinary, as before is said.

Cook 1. parts Instit. 132.

There is a Natural death, a Death *de facto*; and there is a Civil death, a Death in Law. As the Natural death maketh a present Avoydance of the Church *de facto*: So the Civil Death doth make the Church void *de jure*, though not *de facto*.

If a man had entered into Religi-

on,

on, and been Profeſſed (*renunciavit omnibus quæ ſeculi ſunt*) and he was Civilly dead in Law, ſo as his Profeſſion were in ſome houſe of Religion within the Realm, (for of Forrein Profeſſions, the Laws and Judges of the Realm of *England* did not take knowledge) and by ſuch Profeſſion in Religion the Church had become void, whereof he was Incumbent before; Yet might the King being *perſona mixta*, and having both Juriſdictions, as well the Eccleſiaſtical as the Civil, have diſpenſed with ſuch a Parſon, or Vicar, that he might have holden all the Benefices that he had, notwithſtanding his Profeſſion in Religion: and the Patron had no Remedy for ſuch an Avoydance, for that the Church was not void *de facto*, but *de jure* only by the Profeſſion: But in ſuch caſe, if the Profeſſion had been certified by the Ordinary, and no Licence or Diſpenſation had been obtained from the King, to hold his Benefice, then this Civil Death by the Eccleſiaſtical Law had been an Avoydance of the Church, of which the Patron might have taken advantage, and have

have presented another Clark unto the Bishop or Ordinary to be inducted into the same.

By the Ecclesiastical and Spiritual Law the Church may become void divers wayes: as 1. By Cession 2. Deprivation: 3. By Resignation. 4. By Creation. Of all which in several Chapters after very briefly.

CHAP. XVI.

Of Avoydance by Cession; What Cession is; And where upon Cession the Church is void, without Notice; Where not.

BY a Canon made in the Council of *Lateran*, holden under Pope *Innocent* the third; *A.* 1215. it is ordained, *Quod quicunq; reciperit aliquod Beneficium cum Cura animarum, si prius tale Beneficium obtinebit, sit eo jure ipso privatus; Et si forte illud retinere contenderit, alio sit spoliatus: is quoq; ad quem spectat prioris Donatio, illud post receptionem alterius conferat cui merito viderit conferendum.*

ferendum. This Decree or Canon is general. And if a Parſon, or Vicar that had one Benefice with Cure of Souls, had taken another Benefice without Licence or Diſpenſation, the ſame had been an Avoydance of the firſt Benefice, called Ceſſion of the firſt Benefice by the ſaid Canon, without any Sentence Declaratory to have made the Church void.

24 E. 3. 30.
24 E. 3. 26. b. acc.
F.N.B. 34. L.

In 31. Eliz. in the Kings Bench, the Caſe between *Underhill* and *Savage* was this; *Savage* was preſented to a Benefice; and afterwards he was preſented to another, and then purchaſed a Diſpenſation, and was Qualified, and afterwards he accepted of the Archdeaconry of *Gloceſter*; In this Caſe two points were reſolved, I. That by acceptance of a ſecond Benefice, the firſt Benefice was void by Ceſſion, without any Sentence Declaratory by the Statute of 21 H. 8. cap. 13. 2. That if one hath a Benefice with Cure of Souls, and he accepts of an Archdeaconry, that the ſame was not a Benefice with Cure of Souls within the ſaid Statute, as to make his firſt Benefice void.

Paſc. 31. Eliz. B.R. *Underhil* and *Savages* caſe. Leon. 2. Rep. 316.

And although by Ceſſion the

Cook 4. part, 77. in *Hollands* caſe.

Church was ſaid to be void, yet by ſuch Ceſſion it was not ſo abſolutely void *de facto*, that the Lapſe ſhould have encurred againſt the Patron if he had not preſented another Clark unto the Church within ſix moneths, unleſs notice had been given to the Patron by the Ordinary of the ſaid Ceſſion. So if the Incumbent of a Parſonage or Vicarige with Cure, had been made Dean of a Cathedral Church, his firſt Parſonage or Vicarige had been void by Ceſſion by the Eccleſiaſtical Law, and by the ſaid Canon, becauſe that the Dignity and the Benefice were not compatible; And the Statute of 21 H. 8. cap. 13. is but an affirmation of the Eccleſiaſtical Law, and of the ſaid Canon as to this point: But the King might have diſpenſed with the ſaid Canon, and might have enabled any Parſon or Vicar to have holden two Benefices with Cure of Souls, notwithſtanding the ſaid Canon made in the Court of *Rome*: For notwithſtanding that divers Eccleſiaſtical Laws and Canons were firſt made in the Court of *Rome*: yet afterwards they being uſed and confirmed within this Realm, they

† E. 3. 9. Qu. Imp. 35. 24 E. 3. 38.

they by acceptance and usage became the Ecclesiastical Laws of this Realm: & therefore although the said Canon which maketh the taking of a second Benefice to be a Cession of the first, was made and devised in the Court of *Rome*, & notwithstanding that they yet might have dispenced with the said Canon, (and so did) in many Cases: Yet it is adjudged 9. E. 4. 44. in the Case of the Prior of *Oxgate*, that by force of that Canon, and so by the Ecclesiastical Laws of the Realm, by the taking of a second Benefice, the first Benefice became void by Cession.

If any one presenteth himself to a Church, who hath a former Benefice with Cure; this is a Cession by the Ecclesiastical Laws of the Realm: But the Courts and Judges of the Common Law are not to take notice of such Cession, untill the same be certified unto them from the Ecclesiastical Court by the Ordinary. *Vid.* 14 H. 8. 17. acc.

CHAP. XVII.

Of Avoydance by Deprivation; What are Causes of Deprivation in the Spiritual Court approved by the Common Law. Where upon such Avoydance Notice must be given to the Patron by the Ordinary: Where not.

THe second means of Avoydance of the Church, or Benefice with Cure, is Deprivation, which although it be the Act of Law in the Spiritual Court: yet it is grounded upon some act or defect of the party deprived, and is the Discharge of the Incumbent of the Officiating of his Cure or Benefice by a Sentence Declararory in the Spiritual and Ecclesiastical Court, upon a sufficient Cause proved in the same Court against him.

Causes of Deprivation in the Spiritual Court (all which are allowed of by the Common Law) are, *Conscientia Criminis; Debilitas Corporis; Defectus Scientiæ; Malitia Plebis; Grave*

Grave Scandalum; *Irregularitas personæ*: Hereſie, Schiſm, and many others.

In 5 R. 2. A Cardinal was Collated by the Biſhop of *Durham* unto a Benefice with Cure, the Biſhop dyed, and the Temporalties of his Biſhoprick being in the Kings hand, the King brought a *Quare Impedit*, and ſhewed that the ſaid Cardinal was Miſcreant, and deprived for Miſcreancy in the Court of *Rome*: In that caſe it was adjudged, that it was a good cauſe of Deprivation of him; And there *Belknap* one of the Judges, ſwore the Law to be, That if a man for adhering unto the Kings Enemies, ſhall forfeit his Lands for ſuch his adherence, and the King ſhall have the Eſcheate of them, becauſe he is out of the Faith of his Leige Lord, the King; *á fortiori*, he ſhall forfeit his Living, who is out of the Faith of God: And it was in that caſe further agreed, That although the ſaid Cardinal was deprived in the Court of *Rome*; yet whether he was Miſcreant, or not Miſcreant, ſhould be tryed here in *England* where the Church was, *V.* 5. R. 2. tit. Tryal 54.

by the Bishop of the Diocess there.

38. E. 3. 2. & 3. If the Clerk presented be Perjured, and be thereof convicted or attainted in the Spiritual Court upon proceedings of their Law there, or by his own confession, the same is a good cause there for to deprive him of his Benefice; But the Patron of this Deprivation must have Notice given by the Ordinary: and so it is if the Clark presented, be Irreligious, Illitterate, Bastard, Villein, or a meer Lay-man, who hath not taken Orders from the Bishop.

V. 5. H. 7. 14: acc.

If a Parson of a Church be convicted at the Common Law of Manslaughter, and prayeth his Clergy, and hath it granted unto him: yet the same is a good and sufficient cause for them in the Spiritual Court for to deprive him of his Benefice, as it was adjudged, Tr. 15. Eliz. in the Kings Bench in *Searles* case.

V. 19. Eliz. Dyer. 353. *Blowers* Case.

If the Patron presenteth to the Bishop a Lay-man under the age of 23. years, who is admitted, Instituted and Inducted into the Church: and after he is sued in the Spiritual Court by a stranger to be deprived for

for his ſaid Incapacity, and afterwards a *Quare Impedit* is brought againſt the Ordinary, and the Incumbent; and Judgement therein is given againſt the Incumbent for his default at the Grand Diſtreſs, as it may be, and afterwards the firſt Incumbent by ſentence pronounced in the Spiritual Court at the ſtrangers ſuit there is deprived; This Deprivation of him is good, although that he was before removed out of his Benefice upon the Judgement given againſt him in the *Quare Impedit*; But if the Incumbent doth afterwards bring a Writ of Diſceit upon the Judgement given in the *Quare Impedit* by default, for that he was not ſummoned, He ſhall have Judgement thereupon, and the Deprivation in the Spiritual Court ſhall be no Impediment unto him, for that in the *Quare Impedit* the Incumbency was not in queſtion; and he ſhall be reſtored to what he loſt. 27 H. 6 5. acc.

If the Patron preſenteth a meer Lay-man, the ſame is a good cauſe of Deprivation of him, if he be inſtituted and Inducted; But af-

ter such Institution and Induction, he is Incumbent *de facto*, and he ought to be deprived by a Sentence in the Spiritual Court; and of such Deprivation, the Ordinary must give Notice to the Patron: But if the Patron doth present a meer Layman, and the Ordinary doth refuse to admit him, there the Ordinary needs not to give Notice to the Patron of it, for that it is notorious that he is incapable.

12 El. Dyer. 292. acc.

In ancient times, if a man had been a Dilapidator of his Church, he might have been deprived for the same cause; as if a Bishop, a Prebendary, or a Parson had committed Waste in the destroying and cutting down of all the Timber Trees, or Woods, that were standing or growing upon the Lands, or had pulled down the houses belonging unto, or parcel of his Bishoprick, Prebend, or Parsonage, he might have been deposed, and deprived of his Spiritual Living in such Cases; and so it was adjudged, Mic. 12. Jacob. in th' Kings Bench in the Bishop of *Salisburies* Case. And so it was, if a Parson, Vicar, or other Ecclesiasti-

29.E.3.16. 20.H.6.46. 2.H.4.3. by *Thirwit.* Co. 11.pt,72. Cook 11.part, 40. in *Lyford's* Case. Mic. 12. Jac. B.R. the Bishop of *Salisburies* Case. 9 E.4.34.2.

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cal person seized in the Right of the Church, had aliened in the Lands of the Church, he might have been deprived for the same cause: But I conceive, that the same doth not hold to be Law at this day. But *Quere* of it. 20 H. 6. 48. by *Ascough.*

In the time of Queen *Mary*, for a Priest to have been maried, had been a good cause for to have Deprived him of his Benefice in the Spiritual Court. and many Presidents there are thereof; but the same is not so now. 4. Ma. Dyer, 133.

An Incumbent was admitted, Instituted and Inducted into a Benefice with Cure of Souls, in the time of King *Edward* the sixth; and afterwards, in the time of Queen *Mary* he was deprived, because he was a married man, and a favourer of the Religion in the time of King *Edward* the sixth, and the Church being void by this said Deprivation, another man was Instituted and Inducted into the same Church: and afterwards in the time of Queen *Elizabeth* the Last Clark presented was deprived, and the first Sentence of Deprivation in the time of Queen *Mary*, Cook 3. part, 102. *Winsors* Case.

Mary adjudged and declared to be void, and the first Incumbent restored to the Benefice. It was adjudged in that case, that the Deprivation of the first Incumbent in the Spiritual Court was good, and stood good, untill that afterwards the same was declared to be void and untill then the second Clark presented was Lawfull Incumbent: But when the sentence of Repeal came, and made void the first Deprivation, then was the first Incumbent in the Church again of his first Presentation, Institution and Induction, and needed not any new Institution and Induction to the Church.

39 H. 6. 19. acc.

In 39. H. 6. 19. in a *Quare Impedit* the Plaintiff counted that the Church was void by the Deprivation of I. S. who was incumbent of the same; The Defendant shewed, that he had sued forth a Repeal of the said Sentence of Deprivation; but because he did not plead the certainty of the same, how and in what manner it was, the plea of the Defendant was disallowed by the Court: Out of which case it is clearly to be gathered, the Deprivation

tion ſtood, and I. S. was not Incumbent of the Church.

There are many other Cauſes of Deprivation of the Incumbent, which at this day are allowed and approved of by the Common Laws of the Realm, as good Cauſes of Deprivation in the Spiritual Court, *viz.* Diſobedience to the Ordinary, Incontinency, Drunkenneſs, *&c.* Or if a Parſon, or a Vicar had remained Excommunicated by the ſpace of forty dayes, and had not been received into the Church, the ſame had been a ſufficient cauſe in the Spiritual Court to have deprived him of his Benefice which he then held. But in ſuch and the like caſes, the Church was not void *de facto*, without a ſentence given in the Eccleſiaſtical Court: And at this day the King may pardon the Offence; and then he ſhall not be deprived or ouſted of his Benefice by ſuch ſentence.

But it is to be noted, That in all caſes of Deprivation in the Spiritual Court, there muſt be a ſentence in force againſt the party; For if ſentence ſhould be given in the Spiritual Court

Court against the Incumbent for any of the causes aforesaid, and he make his appeal to a Superiour Court, depending the appeal, the first sentence is in suspence, and the Church shall not be void, until the sentence upon the appeal be approved, and confirmed; and if the first sentence be disaffirmed and Repealed, then is the party still Incnmbent by force of his first Presentation, Institution and Induction of him to the Church.

§ R. 2. tit. Qu. Imp. 143.

Thus much of Avoydance of the Church by Deprivation of the Incumbent, by sentence Ecclesiastical, approved and allowed for sufficient causes of Deprivation at the Common Law.

CHAP.

CHAP. XVIII.

Of Avoydances by Act of Parliament; And where upon such Avoydances by Parliament Notice is requisite: where not: And what manner of Notice is sufficient: what not.

THere is an Avoydance of the Church also by Statute Law, in which cases there needeth not any sentence to be given of Deprivation of the Incumbent in the Spiritual Court.

The Statute of 21. H. 8. cap. 13. is, that if any Parson having a Benefice with Cure of Souls, of the yearly value of 8. l. doth accept and take another Benefice with Cure of Souls, and be instituted and inducted into the same, immediately after possession had thereof, the first Benefice shall be adjudged in Law to be void, and the Patron shall present in such manner and form, as though the incumbent thereof had dyed.

V. Mic. 9. Car. C. B. rot. 441. The King and the Bishop of *Canterbury* and *Pryss* Case. 3 Cro. 1. p. 258. acc.

By this Statute, if the incumbent had taken a second Benefice without

out Dispensation, the first Benefice had been void without any Declaratory sentence of Deprivation made of the incumbent in the Spiritual Court; and of such Avoydance the Patron is to take notice at his peril.

Pasch. 26 Eliz. in the Common Pleas, if a man be presented to a Benefice with Cure of Souls of the value of 8 l. *per an.* and afterwards he is presented unto another Benefice of the value of 20 l. *per an.* and then is deprived for Plurality. It was adjudged in this case, That the Ordinary must give notice to the Patron; for till Deprivation it is no Cession.

V. 9 El. Dyer. 255.
7 Eliz. Dyer. 233.
Co. 4. p. 79.
23 El. Dyer. 377.

Quere, But if a man hath a Benefice with Cure of Souls of the clear yearly value of 8 l. and taketh another Benefice without Dispensation, and doth not read the Articles of Religion appointed by the Church, and the Act of Parliament, and afterwards dyeth, The admission and institution of him into the second Benefice, was meerly void, and the first Benefice was void by his death, and not by the Statute of 21 H. 8.

The

The words of the Statute of 21 H. 8. cap. 13. are, *Shall take another Benefice with Cure of Souls of the yearly value of* 8 *l.*

In the eighth year of the Reign of King *James*, a Question was in the Court of Common-Pleas, what value the Parliament of 21 H. 8. intended; Whether the very value of the Benefice, or the taxed value, *viz.* as the same was valued at in the Book of First fruits: The Case was this, The King brought a *Quare Impedit* against the Bishop of *Bristol*, and *Hauleigh* Incumbent, for disturbing of him to present to the Church of *Swyre* in the County of *Dorset*, which came unto him by Lapse. And set forth the Statute of 21 H. 8. and shewed, That *Hauleigh* the Incumbent the Defendant was Parson of *Swyre*, and that *Swyre* was a Benefice with Cure of Souls, of the value of 8 l. *viz.* of the value of 30 l. *per an.* and further set forth, That the Defendant *Hauleigh* had taken another Benefice with Cure, *viz.* of *Milbury Buck.* in the said County of *Dorset*, by reason whereof, the first Benefice was void, and continued void for two years,

Pasch. 8 Jac. in C.B. the King and the Bishop of *Bristol* and *Hauleighs* Case.

years, and ſo the King ought to preſent, and the Defendant did diſturb him. The Biſhop pleaded, That he claimed nothing but the admiſſion and inſtitution as Ordinary. *Hauleigh* the incumbent pleaded a ſpecial Plea, *viz.* By Proteſtation, That the Church of *Swyre* at the time of the making of the Statute of 21 *H.* 8. was but of the value of 7 l. 14 s. *& non ultra*; and pleaded the Statute of 26 H. 8. by which, the Lord Chancellor had Commiſſion to enquire of the value of all Benefices, and to certifie the ſame into the Exchequer; and that a Commiſſion was awarded unto divers Knights and Gentlemen in the County, who upon Inquiſition found and returned, the Church of *Swyre* to be of the value of 7 l. 14 s. 4 d. which was certified by them into the Exchequer; and that he was inſtituted and inducted into the Church of *Swyre*; and becauſe the ſame was but of ſmall value, the Archbiſhop of *Canterbury* afterwards *quantum in ſe eſt*, did grant unto him Diſpenſation, to take another Benefice, which Diſpenſation was confirmed by the Kings Letters Patents;

tents; and that afterwards he was preſented unto, admitted, inſtituted, and inducted into the ſaid Church of *Milbury Buck.* being a Benefice with Cure, of the value of 8 *l. per an.* and upon the plea of the ſaid Defendant *Hauleigh*, *Henry Hobart* Kt. the Kings Attorney General did demur in Law. This Caſe was argued by all the Serjeants at the Bar. And *Tr. Paſc.* 8 *Jacobi* by the Juſtices, *viz. Foſter*, *Warbarton*, *Walmeſley*, and *Cook* Chief Juſtice. And the Court was divided in their opinions; for *Foſter*, and *Walmeſley*, Juſtices, held, That the value ſhould be taken according to the taxed value, and as the ſame was in the Book of Firſt-fruits. But *Warbarton*, and *Cook*, Chief Juſtice, were of opinion, That the value in the Act of 21 H. 8. ſhould be taken the very value of the Benefice, and the Caſe was adjourned for variance in opinion and difficulty in the Exchequer Chamber. And as I have heard, the Caſe was afterwards compounded by order from the Kings Majeſty. And in the proof and maintenance of the opinions of *Warbarton* and *Cook*, ſome Preſidents were

shewed in the Court of Common-Pleas. One in 40 *Eliz.* in the Court of Common Pleas between *Bush* and *Smith*; where issue being taken upon the value of the Benefice, the Jury found the value to be according to the very value, and not according to the taxed value, as the same is in the Book of First-fruits. One other president was 41 *Eliz.* between *Bond* and *Triket* for the Parsonage of *Marston*, Where *Anderson* Chief Justice at the Assizes, directed the Jury (the issue being upon the value of the Benefice, to find according to the very value, and not according to the taxed value;) and so the question rested, and was not stirred again untill *Pasch.* 10 *Car. R.* at what time it was moved again in the Court of Common-Pleas; and was there argued by *Brampston* and *Darcy* Serjeants, and the Court then seemed to incline against the Opinions before delivered by *Warburton* and *Cook* in *Hauleighs* Case; but the Case was not then resolved or adjudged, but it remaineth a Question undetermined. *Query the Law.*

40 Eliz. in C.B. *Bush* and *Smiths* Case. *V.* 24 E. 3. 35. by *Stone* acc. 3 E. 2. Recovery in value 1. by *Birrey.* 7 Eliz. Dyer 237.

V. *Bond* and *Trikets* case. Tr. 43 Eliz rot. 564. B.R. Now reported in Cro. part 3. p. 858.

The Statute of 13 *Eliz.* *cap.* 12. ordain-

ordaineth, That he that doth not ſubſcribe unto the Articles, nor read the Articles of Religion, ſhall be deprived *ipſo facto*; and all his Eccleſiaſtical promotion ſhall be void, as if he were naturally dead: Upon ſuch an avoidance, there needeth not any ſentence Declaratory of Deprivation of the Incumbent, for there the Church is preſently void. And where Avoidance is by Act of Parliament, there needeth not to be any ſentence of Deprivation: For if ſuch a Parſon or Vicar ſhall in the Spiritual Court libel againſt his Pariſhioners for Tythes; They may there plead againſt him the not reading of the Articles, without making mention at all, that he was deprived there for the ſame cauſe.

31 Eliz. *Morris* and *Eatons* Caſe, adjudge. acc.

If one under the age of Twenty three years, be preſented unto a Benefice with Cure; It was adjudged, that in ſuch caſe, That no Lapſe ſhall incur upon any Deprivation, *ipſo facto*, without notice; becauſe that the Act of 13 *Eliz. cap.* 12. ſpeaks nothing of Preſentation, ſo as the Preſentation remaining in force, the Patron ought to have notice thereof.

Tr. 18 Eliz. C. B. the Biſhop of *Hereford* and *Okeleys* Caſe.

Tr. 18 *Eliz.* in C. B. the Bishop of *Hereford* and *Okeleys* Case.

But if an Incumbent be Deprived for not reading of the Articles, the Ordinary must give notice thereof unto the Patron, and the notice must be certain and particular, that the party hath not read the Articles, and general Notice, *viz.* That he is incapable of the Benefice, is not sufficient: Neither is intimation thereof given at the Church door, or in the Pulpit sufficient; but notice thereof must be given to the Patron, and it must be given by the Ordinary: For if the Patron himself, will of himself take knowledge of the Clerks not reading of the Articles, and suffer two years to pass; yet Lapse shall not run upon the Patron, unless he hath had special notice thereof from the Ordinary, and the Patron hath surceased to present another Clerk to the Church. But if the Clerk be refused by the Ordinary for inability, illiterature, or for any of the causes before mentioned, whereof notice ought to be given the Patron. If the Patron doth dwell in a far and remote County, so as he cannot easily

18 Eliz. Dyer 346.

Tr. 41 Eliz. B. R. *Baker* and *Brents* Case. Cro. 3. part, 679. acc.

22 El. Dyer 369.

ly be found out by the Ordinary; in such case, if the Ordinary make the inability of the Clerk, or other cause of his refusal of him, known by intimation fixed upon the Church door; it seemeth, that in that case it is sufficient.

16 Eliz. Dyer, 327. acc.

By the Law, The Presentation unto every Church or Benefice after the same is once void, ought to be *Libera, pura, vera, si Pecunia intervenerit, non est Presentatio, aut Donatio, sed venditio.* If therefore, there shall be any covenant, contract, promise, or agreement, made with the Patron or any other; That the Patron for any sum of money, gift, reward, benefit, or other consideration or thing whatsoever valuable, shall present *J. S.* to the Church or Benefice being void; although the same be made without the consent or knowledge of *J. S.* and afterwards upon such contract, covenant, or consideration, the Patron doth present *J. S.* to the Church or Benefice, and he be admitted, instituted, and inducted into the same, by the Statute of 31 *Eliz. cap. 6.* The presentation, admission, and institution of

him, are abſolutely void, *ipſo facto*, which were before but voidable by Deprivation; and the King ſhall have the Turn, and preſent. For the better proof of this; and to ſhew the ſeveral differences which are taken upon this Statute, and the expoſition of the ſame, I ſhall remember unto you ſome ſpecial Caſes and Preſidents, adjudged in our late Books of Reports, and ſo put an end unto this Chapter.

Parkinſon Patron of the Church of *D.* the Church being void, did contract wite a ſtranger, That for 10 *l. per an.* to be paid unto *Parkinſon* the Patron, during the life of one *Kitchyn*, to preſent the ſaid *Kitchyn* to the Church which was then void, which was done accordingly. And in that caſe it was adjudged by all the Barons in the Court of Exchequer; That although that *Kitchyn* knew not of the ſaid contract, nor was any wayes agreeing or conſenting to the ſame; that yet he was a Symoniſt, and came in by Symonie: For it was ſaid by them, That the Statute of 31 *Eliz.* ſhall be expounded largely againſt Symonie and Symoniſts; and the very

ry presentation, admission, institution, and induction of *Kitchyn* in that case was adjudged void.

If a man purchaseth the next Presentation, or Avoidance to a Church, and doth not mention in certain, what person he intendeth to present when the Church shall become void, he may present any person whatsoever who is capable of the Benefice; But if a man purchaseth the next avoidance or presentation; or the next avoidance or presentation be granted unto him to present J. S. by name, be it the son, kinsman of the Patron, or of a stranger; It was adjudged *Pasch.* 14 *Jac.* in C. B. *Rot.* 1026. in *Pulistons* and *Benedict Winscombs* case, That the same is Symonie, and the Clerk presented comes in by Symonie, and the Patron shall lose his Turn, and the King shall present.

If the Brother giveth money to the Patron, to present his younger Brother, being then a Student in the University, the Church being then void; it was adjudged *Pasch.* 39 *Eliz.* in *Bushes* Case, That if the Patron doth present him accordingly, that

he comes in by Symonie, and the presentation of him was utterly void; and so it is, in case that if the Testator contract by Symoniacal contract, that his Executors shall present such a man by name to the Church, the Church being then void: and the Testator dyeth, and his Executors do present the same person accordingly: this also was adjudged to be Symonie, Mich. 3 Jac. in the Common Pleas, in *Freeman* and *Englishes* Case; although the party presented was not privy to the contract.

And so odious a thing is Symonie in the eye of the Law, That if (the Church being void) a man seeketh for money to be presented unto the same, (although that afterwards the Patron doth present the same man *gratis*) it was the opinion of *Tanfield* Lord Chief Baron in his Argument of *Calvert* and *Kitchyns* Case in the Exchequer; That for this Symoniacal attempt only, he is disabled to take the same Benefice, although in truth he giveth nothing unto the Patron for the same. And every Incumbent who cometh in by reason of such corrupt agreement

or

or contract, or consideration, is so disabled for ever after to be presented to the same Church: That the King himself to whom the Law giveth the presentment, in such case cannot present the same man again to the same Church: as it was holden by the Justices, in the case betwixt the King and the Bishop of *Norwich*: which case see in *Hobarts* Reports 90. For that the Statute being made for the Suppression of Symonie, Symonists, and corrupt agreements, doth so bind the King in those cases, that he cannot enable him, who is disabled by the said Statute. And the party being disabled by Act of Parliament, and the same being an absolute Law, cannot be dispensed withall by any Grant of the King with a *Non obstante*, as a Law may be where a thing is prohibited *sub modo* only, upon a penalty given to the King: and if the King by a special Pardon doth pardon the Symonie, yet that doth not make the person capable of the Benefice, who was disabled by the Statute, nor can he plead the said Pardon against the said Statute of 31. Eliz. as it was Resolved, Mic. 10. Jac.

Jac. in the Court of Common Pleas in *Samford* and Dr. *Hutchinsons* case.

If a man grants a Presentation to B. and B. makes an Obligation to the Grantor to pay him 20. l. when the Church shall become void: It was said by *Reeve* Justice of the Common Pleas, Hil. 17. Car. to which the whole Court agreed, that this was an Obligation made upon a Symoniacal Contract, and so was adjudged in one *Coals* case; and it was said, that in that case the Obligor could not avoid the Bond, but upon a special averment, that it was entered into upon such a Symoniacal contract: But if one present I. S. to the Church which is void, and upon the Presentation of him, he taketh an Obligation of him to resign upon request, that the Obligee may present his Son when he is of full age, to the Church, and capable of the Benefice: it was Resolved in this case, Mic. 8. Jac. in B. R. in *Johns* and *Lawrences* Case, which case *V.* Cro. 2. part, 248. that the same was a good Obligation, and was not made upon a Symoniacal contract.

V. Mic. 9. Car. in B. R. *Morkaller* and *Todricks* case. Cro. 1. part, 241, 257, 263.

If the Church be void by Symonie by the Statute of 31. Eliz. the Ordinary

nary is not bounden to give Notice of the Avoydance within six moneths after the presentment made, as it was adjudged, Mic. 8. Jac. in the Common Pleas in *Goodwins* case: For that for the most part, the contracts by Symonie are made so secret, that the Ordinary cannot have Notice of them, and the Church is void by the Act of Parliament, and therefore no notice is requisite. But if a Clark presented be deprived in the Spiritual Court, there of such Deprivation Notice ought to be given by the expres words of the Statute: and so it was holden in *Baker* and *Brents* case: which Case, see in Cro. 3. part. 679.

CHAP.

CHAP. XIX.

Of Avoydance by Resignation: What Resignation is, and to whom to be made; And when, and where all charges of the Incumbent shall be avoided upon Resignation; and where not.

THe third means, How the Church may become void, is by Resignation, which is the Act of the party. Resignation is the voluntary yielding up of the Incumbent of his Benefice to make the Church void of his incumbency: If it be of a Benefice with Cure of Souls, the Resignation must be made to the Bishop, who is the immediate Ordinary, by whose admittance and institution he came first into the Church: and cannot be made unto the King as Supream Ordinary in all the Dioceſſes of *England*; and the reason thereof is, because that upon the Resignation the Ordinary is to give notice to the Patron of the Avoydance, to the intent that the Patron

1. H. 7. Qu. Imp. 103.

Patron may present another to the Church; which the Bishop may do, but the King is not bounden to do.

If two Parsons do agree to permute or change their Benefices; this can be done or perfected by any of their own Acts; but there must be a Resignation of their Benefices first made unto the Ordinary: and they must be inducted and setled therein by him: But if any Resignation be made of any other Dignity or Promotion Spiritual in the Church, and not of a Benefice with Cure of Souls, there to distinguish the Dignity, or Spiritual Promotion, the Resignation thereof made unto the King as Supream Patron or Ordinary is sufficient, so as it be made by fit and apt words. *V.* 10.H.6.11.

Goodman Prebendary of the Prebend of *Cory* in the Cathedral Church of *Wells*, by Deed enrolled did grant, render, and confirm unto King *Edward* the sixth, *Totam Prebendam suam de Cory, & omnia Maneria, possessiones, jura & hereditamenta quæcunque tam Spiritualia quam Temporalia, & plenam & liberam dispositionem*

nem authoritatem & poteſtatem dict. Prebend. perminentem, ſpectantem ſive incumbentem. Habend. eidem Domino Regi & ſucceſſoribus ſuis ad eorum proprium uſum ad omnem juris effectum quæ ex inde ſequi poterit aut poteſt dictæ Prebendæ; & omnia jura mihi ratione ejuſdem: qualitercunque acquiſita (ut decet) ſubjicio, & ſubmitto. It was agreed by all the Judges in this caſe; 1. That the Reſignation of the Dignity made unto the King as Supream Ordinary, was good to extinguiſh the Dignity, although the ſame was not made to the immediate Ordinary. 2. That thoſe words were effectual and ſufficient in Law to make a Reſignation of the Prebend. 3. That by that Deed, and by thoſe words *Canoniam ſive Canonicatum*, his Spiritual Function was ſurrendred up to the King: For by the Law, *Reges ſacro oleo uncti ſpiritualis Juriſdictionis, ſunt Capaces.* And again, *Rex eſt perſona mixta cum ſacerdote*; and by the Canon and Common Law, Kings are capable of Tythes, Proxies, and other Spiritual things, of which other Lay-men are not capable, as is reported by Sir *John Davis* in his Caſe of

of Proxies in his Iriſh Reports.

The words of ſubſtance in the Inſtrument of Reſignation made unto the Ordinary, muſt be either *renunciare*, *cedere*, or *remittere*, in the caſe of a common perſon: For the word [*Reſignare*] is no fit or proper word for Reſignation of the Church, as it was taken by the *Civilians* in *Goodmans* caſe: But in caſe of the Dignity reſigned unto the King, The words in the ſaid Grant were holden to be ſufficient to make a Reſignation of the ſame.

The time of the Reſignation is ſecondly conſiderable, and therefore if a man preſented unto a Benefice with Cure of Souls be admitted and inſtituted by the Biſhop, the Church in caſe of a common perſon is ſaid to be full, and he may reſign his Benefice; But where the King is Patron, there becauſe that the Church is not full until Induction, he cannot reſign before he be inducted: But in no Caſe before he be inducted can he charge the Gleab; and if he be inducted, and doth charge the ſame: yet ſuch charge upon his Re-

Reſignation ſhall be avoided, and ſhall bind but only during his own time: as if a Prebendary or Parſon
12. H. 8. 8. by *Pollard.* makes a Leaſe for years; and afterwards he reſigns, the Leaſe for years
26. H. 8. 2.
21. H. 7. 1. b. ſhall be avoided. And ſo if a Parſon or Vicar alien the Gleab of his
2. H. 4. 5. Church, or permute or change the ſame, the Succeſſor may enter. But
12. H. 8. 9. if a Writ of Annuity be brought againſt a Parſon, who prayeth in aid of the Patron and Ordinary, and the aid is granted, and they both make
20. H. 6. 46. b.
7. H. 6. 38.
22. H. 6. 28. default, and afterwards upon their default, the Parſon doth confeſs the Action, and then doth reſign his Benefice, or dyeth, this by the Common Law ſhould have bounden the
4. H. 7. 2.
19. H. 6. 39. Patron, Ordinary and the Succeſſor, becauſe the Parſon had done as much as lay in him, to have freed and diſcharged the Gleab, by praying in aid of the Patron and Ordinary.

10. H. 6. 10. If a Writ of Annuity, or other Writ be brought againſt a Parſon, or Vicar, and pendant the Writ, the Parſon or Vicar reſign his Parſonage or Vicarige into the hands of the Ordinary, becauſe the Reſignation is

the

the Act of the party, he ſhall not take advantage thereof, and abate the Writ brought againſt him. But if a Writ be brought by an Incumbent of a Church, and pendant the Writ, he reſigns his Benefice, he ſhall abate his own Writ, if it be brought for any thing in the right of his Church.

The Abbot of *Mornaby* brought a Writ of *Detinue* againſt J. S. proceſs continued untill J. S. was Outlawed, and afterwards he purchaſed a pardon of the Outlawry, and had a *Scire Facias* againſt the Abbot, and the Writ being delivered to the Sheriff, the Sheriff made his Retorn of it, That he could not warn the Abbot, becauſe that before the Writ was delivered unto him, the Abbot was depoſed: This by the whole Court was adjudged to be a good Retorn; For the depoſing of the Abbot was the act of the Law, and it was done before the Writ was delivered unto him; and after he was depoſed he was but a Monk, and ſo could not be warned without his Soveraign; and the Soveraign could not be warned, becauſe he was not a party to the firſt Original: But if a Writ be brought

1 H 6. 2. The Abbot of *Mornabies* Caſe.

2 Ma. Dyer 105.

10 H. 6. 11.

againſt a Parſon or Vicar, and the Parſon or Vicar is Deprived for ſome act of their own, as Incontinency, Drunkenneſs, &c. there the Writ ſhall not abate. But the Succeſſor in the caſe of the Abbot if he die, upon ſhewing of the matter in Court, ſhall abate the firſt Writ.

¶ If an Incumbent taketh forth proceſs againſt J. S. for any thing which doth concern his Rectory, and after permuteth or changeth his Benefice with another; and before the Retorn of the Writ the Exchange is avoided, he is in again of his old eſtate, and his firſt Action or Writ ſhall not abate; And ſo it is, if after his Action brought he reſigneth his Benefice, and before the Retorn of the Writ, he is promoted again to the ſame Church, this ſhall make the firſt Action good.

CHAP.

CHAP. XX.

Of Avoidance by Creation; Whether Notice be requiſite thereof. From what time the ſix Moneths ſhall be accounted; And where Writs ſhall abate upon Creation, where not.

THE fourth and laſt means of Avoidance of the Church or Benefice with Cure, is by creating of the incumbent thereof a Biſhop; For ſo ſoon as ever he is Conſecrated (but not before) without any Declaratory ſentence in the Spiritual Court, all his former Dignities and Benefices are *ipſo facto* void; and the King (or other Patrons) ſhall preſent unto them; and if they be diſturbed, they ſhall have *Quare Impedit Præſentare ad Eccleſiam.* And the reaſon why the former Benefices are *ipſo facto* void, is not only for the inconvenience of Plurality, but alſo for that it would be very inconvenient, That one and the ſame man ſhould be Subject, and Sovereign; but until Conſecration, his former Benefices are not void: For although he be elected, and confirmed Biſhop; yet

29 H. 8. pet. br. 116. 7 E. 4. 40. 21 E. 3. 40. a. & b. 41 E. 3. 6. 11 H. 4. 37. by Hill. 46 E. 3. 32. 22 H. 6. 27. 4 Ma. br. 494. 16 Eliz. Dyer 228. 11 H. 4 38. 5 Ma. br. 498.

41 E. 3. 6.
11 H. 4. 213.

yet before he be Consecrated, the King may dispense with him, to hold all, or any of his former Dignities or Benefices in *Commendam*; and that the King hath done, and many times doth, where the Bishoprick unto which he is promoted, is but of small Revenue, and not of sufficient competence to support and maintain the Charge and Honour of a Bishop.

Of the Consecration of the Incumbent Bishop, the Patron is to take notice at his peril; and the six moneths shall be accounted from the time of the Consecration, as before is said.

Consecration of the incumbent Bishop, is the act of the Law, and of the King, and not of the Incumbent. And

44 E. 3. 9.
14 H. 8. 16.
Cook 1 part, Institut. 132.

therefore, if the Incumbent bringeth an Action of his own Free-hold, or Person, and afterwards (pendant the Writ) he be created Bishop, the Writ shall not abate, as the Writ shall do brought by the Incumbent for any thing which doth concern his incumbency, or Rectory, upon the resignation of his Benefice, which is the meer Act of the Incumbent himself.

What are the Incidents to the Creation of a Bishop; How the same is done,

done, and by whoſe authority; and what acts, or things a Biſhop may do after he is Elected, and before he be Conſecrated; and how, and by what means his Temporalties are delivered unto him, I have before declared. This only take for a concluſion of this matter of Conſecration, *viz.* That as to the perfecting of an Incumbent, and bringing of him into the Church, four things are required, that is to ſay, Preſentation, Admiſſion, Inſtitution, and Induction. So to the promoting of an Incumbent unto the Office and Dignity of a Biſhop, there are four things neceſſary required (of which I have before ſpoken) *viz.* Election, which hath the reſemblance of Preſentation; Confirmation, which hath the reſemblance of Admiſſion; Conſecration, which hath the reſemblance of Inſtitution; and Inſtallation, or Inthronation, which hath the reſemblance of Induction.

CHAP. XXI.

Of Pluralities: How the Incumbent is capable thereof, and by whose means he is made capable. How by the Canon Lawes, no man was capable of Plurality, and how the King might dispence with the Canon. Where, and in what Cases, and by whom Faculties, Commendams, and Pluralities were granted before the Statutes of 21 and 25 H. 8. and 1 Eliz. Of Commendams, Recipere, and Retinere, and their difference. And of Commendams granted at this day by the Archbishops.

I Have briefly set forth how, and by what means a Spiritual person is capable of one Benefice with Cure of Souls; and what be the incidents to make him a perfect Incumbent of the same; I have shewed also, by what acts either of the Law, or of the party he may be deprived and put out of his Benefice after he is inducted into the same. Having thus enabled him, and set him a perfect incumbent of one Benefice; let us now see, whether

ther he be capable of more Benefices with Cure of Souls, or of more Dignities in the Church than one, and by what, and by whose means he is made capable thereof.

It is most certain, That by the Canon of the Church made in the Council of *Lateran*, No Ecclesiastical person whatsoever, could have holden *simul & semel*, two Benefices with Cure of Souls, but upon the taking of the second, the first Benefice was void by the said Canon. 24 E. 3. 33. 39 E. 3. 44. F. N. B. 34. L. Cook 4. pa. 75.

In 26 E. 3. *Quare Impedit.* 189. The King brought a *Quare Impedit*, by reason of the avoidance of a Church by a Plurality by the said Canon. The Defendant would have demurred to the Jurisdiction, but he durst not do it, for that the same was a Spiritual thing, and tryable by the Ecclesiastical Court; wherefore he pleaded another plea, *viz.* That the Church did become void, the Temporalties being in the Kings hands. 26 E. 3. Qu. Imp. 189.

And *vide*, and note upon the Book of 10 *Ass.* p. 4. where it is said, it may be collected out of that 10 Ass. p. 4.

Book; that a Benefice of the value of 10 *l. per an.* is said to be a sufficient advancement for a Clerk.

The said Canon of the Church made in the said Council of *Lateran*, as to the matter of substance thereof, is now as it were ratified, made good, and confirmed by the Statute of 21 H. 8. cap. 13. But before the said Statute, The King now, and the Pope before, notwithstanding the Ecclesiastical Canon, did by usurpation, and the King might *de jure* have dispensed with the said Canon, and might have enabled the Incumbent of any Church or Benefice with Cure of Souls to have taken a second Benefice, with Dispensation granted unto him; and so might the King have dispensed with any man to have holden any other Spiritual Dignity or Promotion in the Church together with his other Benefices. And the reason why the King might have dispensed with the said Canon, was, for that anciently Kings, and Lay Subjects, by Licences from the King, were the first Donors of Benefices and Ecclesiastical Dignities to Ecclesiastical persons: For as one saith,

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The Donations were *Eleemosynæ Regum & Laicorum*; And also for that such Dispensations were not repugnant to the Common Lawes of the Realm: For that by the Common-Law, by the taking of a second Benefice, the first Benefice was not void, but was voidable only by the said Ecclesiasticall Canon; and the King notwithstanding the said Canon, did give licence to Incumbents of Churches with Cure of Souls, to hold two Benefices: For we read, That *Edmund* the Monk of *Bury* held many Benefices by vertue of such Dispensations; And it hath been seen (saith *Haukford*) in 11 H. 4. 91. That one man hath been Abbot of *Glassenbury*, and Bishop of another Church *simul & semel*.

Here two Questions may materially be moved; The first, If a man be Parson of a Church Impropriate, with a Vicar perpetually indowed, and he that is the Parson accepteth of a Presentation unto the Vicarige without Dispensation; Whether the same be a Plurality by the said Canon; and also by the Statute of 21 H. 8. cap. 13. And I conceive the

the Law to be, That notwithstanding that they are several Advowsons, and that several *Quare Impedits* may be brought of them, and that several Actions may be maintained concerning their possession: Yet I conceive That the presentment of one and the same man unto the Parsonage and Vicarige, neither before the said Canon, nor since, to be any Plurality: First, Because the Parsonage and Vicarige are both but one Cure, and that appeareth in the *Proviso* in the Statute of 21. H. 8. sect. 25. the words of which *Proviso* are; Provided, that no Parsonage that hath a Vicar endowed, be taken under the name of a Benefice with Cure of souls. And secondly, Because the Parsonage and Vicarige are but one, the Vicarige being endowed out of the Parsonage, and a man may be his own Vicar. And of this opinion was *Hobart* Lord Chief Justice of the Court of Common Pleas. *Mich.* 21. Jac. in *Woodley* and *Mannorings* Case.

The second Question is, Whether the Presentation of one man unto several Advowsons or Livings in one Church, each of them being of the

the value of 8. l. be now a Plurality or not, and I do conceive it to be no Plurality: First, Because it is out of the intent and meaning of the said Canon; the words of which are, *Plurima potissimum Beneficia quibus animarum Cura submissa est, non sine gravi Ecclesiarum damno ab uno obtineri, cum unus in pluribus Ecclesiis rite officia persolvere aut rebus earum Curam necessariam impendere nequeat*; But in this Case, 1. The Parson is not in *pluribus Ecclesiis*, but in one Church. 2. When there are several Advowsons, (as in this Case) one Parson hath not the whole Church, nor the whole Cure of souls; and the words of the Statute of 21 H. 8. are, If any Parson having one Benefice with Cure of souls, of the value of 8. l. accept and take another Benefice with Cure of souls, *&c.* But in this Case, he hath not one whole Benefice, nor hath he the whole Cure of souls. And as in case, If a Consolidation be made of three Churches, they are all now one incumbency, although the Advowsons be several for the Patrons to present by turns; and the Writ of *Quare Impedit*

Impedit shall be *presentare ad Ecclesiam*; for now upon the matter there is but one Church, and one incumbent: So in this case, The Church upon the matter, shall be but one, and so the same is no Plurality either by the said Canon, or within the said Statute of 21. H. 8.

As the King might by the Common Law, notwithstanding the said Ecclesiastical Canon, grant Dispensations to hold divers Benefices in *Commendam*: So may he do at this day notwithstanding the Statute of 21. H. 8. For the power which the Pope had by usurpation in this Realm in granting of Faculties, Pluralities, and Commendams, *&c.* is absolutely now taken away by the Statute of 21. H. 8. and by the said Statute, and by the Statute of 1. Eliz. the same is transferred and setled in the King *de jure*, and from and under the King, in the Archbishop of *Canterbury*, his Commissaries & sufficient Deputies, who have the granting of them under him by authority derived from the Crown: But then it is to be noted, That there is a great difference between Dispensations, and Facul-

Faculties granted by the Pope in antient times, and Faculties granted by the King and Archbiſhop at this day. At this day, a Diſpenſation granted by the Archbiſhop, and confirmed by the Kings Letters Patents (as the ſame muſt be) *retinere Beneficium cum cura animarum*, is good only to ſuch a perſon who is full and perfect incumbent of the Church at the time of the Diſpenſation to him, and is not good to him who is not incumbent at the time of the grant: but it was otherwiſe ſometimes, where Diſpenſations were granted by the Pope.

A prebendary of *Salisbury* was elected Biſhop of St. *Davids*, and before he was Conſecrated, he obtained a Diſpenſation from the Pope *retinere*, all his Benefices in *Commendam*, and afterwards he was Conſecrated Biſhop: And the better opinion of the book of 11. H. 4. 170, 213, 229. is, That the King could not have a *Quare Impedit* againſt the Biſhop for the Prebend, nor any action upon the Statute of 25. E. 3. which gave the Preſentation to the King, where the Pope by proviſion gave any benefice whereof the Patronage did

did belong unto a Spiritual person. And by *Haukford*, in that Case of Dispensation *retinere*, the Bishop shall not pay first fruits; but it was there much debated, and at last agreed; That if the Dispensation *retinere* had been granted unto him after the Bishop had been Consecrated, whether the Prebend had been void, and whether any Faculty could have been granted to have enabled him to have holden the same against the King: But at this day the King *ex authoritate sua Regia qua fungitur*, may grant unto a Bishop after he is Consecrated Dispensation *retinere & obtinere Beneficium cum cura animarum*, by presentation, institution, and induction, and to hold the same in *Commendam*; for so the Pope used to do by usurpation in this Realm; and the same power which the Pope had, is by the Acts of Parliament in 25. H. 8. and 1. Eliz. acknowledged to be in the King *de jure*.

Cook 4. part. 75. in *Holands* Case.

If a man be instituted and inducted into a Benefice with Cure, of the value of 8. l. *per an.* and afterwards the King presents him to another Church, which is a Benefice with Cure;

Cook 4. part, 79. *Digbies* Case.

Cure, and he is admitted, and inſtituted; and afterwards the Archbiſhop of *Canterbury* grants him Letters of Diſpenſation to hold two Benefices, and the King confirms the ſame, and afterwards he is inducted into the ſecond Benefice, there the Diſpenſation comes too late, becauſe by the inſtitution into the ſecond Benefice, the firſt Benefice was void by the Statute of 21. H. 8. But where a man is incumbent of a Church, and Parſon or Vicar *de facto*, there a Diſpenſation *retinere* the ſame Benefice, upon his promotion to the office, or dignity of a Biſhop, comes time enough, as it was holden Paſc. 3. Car. in B. R. in *Evans* and *Aſcoughs* caſe: and ſuch Diſpenſation, or Faculty, granted by the Archbiſhop his Commiſſary, or by the Guardian of the Spiritualties (*ſede vacante*) is ſufficient, although the ſame be not enrolled in the Chancery, or in any other the Kings Courts of Record, but only entred in the office of Regiſter of the Archbiſhop. 7. Eliz. Dyer 233.

The Corporation of *Kilkenny* in *Ireland* were Patrons of a Vicarige, within the Dioceſs of *Oſorry*, and pre- *Vi.* the caſe of *Commend.* in Sir *Joh. Davies* Reports.

presented A. unto the same, who was admitted, instituted, and inducted, and during the life of the incumbent the Church being full, the Archbishop of *Dublin* granted unto I. S. then Bishop of *Osorry*, that *unum vel plura Beneficia, curata vel non curata, retinere possit perpetuæ Commendæ titulo*, which was confirmed by the Kings Letters Patents; A. died, and the Church was void by six months; And the Bishop of *Osorry* by vertue of the same Dispensation did retain the Vicarige in *Commendam*; and it was holden there by many good Lawyers; That the Faculty was well executed to the Bishop by his acceptance without a Presentation, Institution, and Induction into the same; for it was said, That those Ceremonies were not necessary for the conferring of the Vicarige to the Bishop, because the same might have been done by other wayes, *viz.* by union or appropriation; for so it was in *Grendons* case, which see Mr. *Plowdens* Comment. 500. But quere of that Case; for it was not adjudged: and the Bishop was not the present incumbent of the Church, and so the *Commendam*

retinere

retinere as before is ſaid, void according to the opinion delivered in *Co.* 4. part, in *Hollands* Caſe. And yet *vid.* Trinit. 11 Jacobi in Co. B. the Caſe between *Colt* and the Biſhop of *Coventry* and *Lichfield*, where ſuch a Diſpenſation granted by the Dean and Chapter, Guardians of the Spiritualties (*ſede vacante*) of the Archbiſhop to the Biſhop of *Coventry* and *Lichfield*, *retinere* any Benefice under the value of two hundred marks *per an.* in *Commendam*, and that he might hold the ſame without any Preſentation, Admiſſion or Inſtitution, was pleaded by the Biſhop, and the plea holden to be good; but *Quere.*

Vi. & Lege *Colt* and the Biſhop of *Coventries* caſe at large reported in *Hobart's* Reports, from fo. 140. to 163.

CHAP. XXII.

Who may be dispensed withall to have Plurality within 21 H. 8. *Of Reteiner of Chaplains, and how many Chaplains Noble Men, and Officers of Honour and Place may retain. What shall be a good Reteiner of a Chaplain; and where Dispensation granted to such Chaplain for Plurality shall be good, where not.*

WHat persons are capable of Pluralities, and what to grant them at this day, and what not, appears by the Statute of 21 H. 8. cap. 13.

The King, Queen, Prince and other the Kings Children are not limited within the Statute how many Chaplains they shall retain: and therefore they may retain as many Chaplains as they please; and every of their Chaplains may purchase a Dispensation to purchase a Plurality. But Archbishops, Bishops, Dukes, Marquesses, Earls, Countesses, Barons, and all other Officers of Honour and Dignity mentioned

mentioned in the Statute, are ſtinted how many Chaplains every of them may retein, who are capable to have plurality. And the Qualifications of ſuch their Chaplains, muſt be *ſub ſigno & ſigillo*, of the ſaid King, Lord, *&c.* othetwiſe the ſame is not good, as it was Reſolved, 28 *Eliz.* in *Savacres* Caſe.

A Counteſs may retain two Chaplains within the Statute, and each of them may purchaſe Diſpenſation to have and to hold two Benefices with Cure of Souls. But if a Counteſs who is a Widow doth retain two Chaplains, and afterwards doth retain a third Chaplain, and the third Chaplain doth before any of the other two, purchaſe a Diſpenſation to hold two Benefices with Cure, his firſt Benefice being of the clear value of 8 l. the firſt Benefice is void by the Statute: For that, when the Counteſs hath retained two Chaplains, thoſe two are only capable of Diſpenſation within the Statute, and the Reteiner of the third Chaplain cannot deveſt the capacity of Diſpenſation which was veſted by their

Coo. 4. part. 90. *Dyuries* Caſe.

Reteiner in the two first Chaplains; and therefore the Dispensation purchased by the third Chaplain is void, and comes too late to make him capable of Plurality, and so his first Benefice is void by the Statute.

18 Eliz. Dyer. 312. If a Baron, who is allowed but three Chaplains, doth retein six by his Letters Testimonials under his hand and seal at one time; and all six of them are preferred to six several Pluralities; the three first Chaplains are only warranted by the *Statute*, and Dispensation for Pluralities purchased by them, only is good; and the three last shall not be reputed his Chaplains within the *Statute*, so long as the first three are in his service, or are living; and therefore the purchase of Dispensation by the three last for Pluralities are meerly void.

Co. 4. part, 5. 27 Pasc. 29 El. C. B. Swaines Case. Co. 4. par. 90. Pasc. 28 El. in Co. B. Rott. 1130 Swaines Case, acc. If a Baron doth retein three Chaplains according to the *Statute*, and each of them purchaseth a Dispensation for Plurality, and are advanced according to the *Statute*; if the Baron afterwards dischargeth one of them of his service, he cannot retein another during the life of him that is discharged;

diſcharged; for then the *Statute* ſhould be defrauded, and he might advance Chaplains without number.

If a Counteſs that is a Widow, doth retein a Chaplain, and he purchaſeth a Diſpenſation for Plurality, and afterward the Counteſs entermarrieth with a Peer of the Realm, and afterwards the Chaplain is admitted, inſtituted and inducted into a ſecond Benefice with Cure; This is well and good in Law, for that the Reteiner was not countermanded by the entermarriage. But if an Earl or Baron reteineth a Chaplain, and before he be advanced unto any Benefice, the Earl or Baron be attainted, now is the Reteiner thereby determined before the Diſpenſation obtained; and therefore if ſuch a Parſon having a Benefice with Cure of ſouls, of the value of 8 l. *per annum*, doth afterwards without other Diſpenſation obtained, take another Benefice, the firſt Benefice is void by the *Statute*.

Co. 4. par. 118. *Actons* Caſe.

Co. 4 par. 119. The Counteſs of *Weſtmerlands* Caſe.

The *Statute* of 21 H. 8. cap. 13. ſhall be conſtrued largely againſt Pluralities, as being prejudicial to the

service of God, and the instruction of the people. And therefore if a Bishop be translated, and made an Archbishop, and holdeth both Dignities, or a Baron be created an Earl, although he hath both the Dignities and Honours conjoyned in one person; yet shall he have but so many Chaplains, as an Archbishop or Earl may have, who shall be capable of Dispensation to have two Benefices with Cure within the Statute.

18 Eliz. Dyer 347.

If a man long before the making of the Statute of 21 H. 8. hath a Dispensation from the Pope for a Plurality; and at the time of the making of the Statute of 21 H. 8. hath one Benefice with Cure of Souls of the yearly value of 8 l. *per an.* and within one year after the making of the Statute of 28 H. 8. cap. 16. he obtaineth a Confirmation of his former Dispensation, with words in the Confirmation, to hold, use, and enjoy the effect of his Dispensation; yet by the Opinions of *Mounson* and *Manwood* Justices, the first Benefice is void by the Statute of 21 H. 8. and the Statute of 28 H. 8. cap. 16. doth not restore

reſtore him to the ſame without a new Preſentation, notwithſtanding that the Statute of 28 H. 8. made the Bulls of Diſpenſation made by the Pope good for one year; and if they be ſurrendred, That the Chancellor of the Augmentation may make a new Diſpenſation unto him. But by *Dyer* Juſtice, as the Statute of 21 H. 8. made the firſt Benefice void. So the Statute of 28 H. 8. cap. 16. did reſtore him to the Benefice; for when two Statutes are croſs in appearance the one to the other, and no Clauſe of *Non obſtante* be contained in the ſecond Statute, ſo that the one may ſtand with the other, ſuch Conſtruction ſhall be made of the Statutes, that both of them ſhall take effect.

The Statute of 21 H. 8. would not that there ſhould be a parity or equality of all perſons in the pale of the Church; *Nihil enim eſt majus inæquale, quam Æqualitas.* And therefore the Statute provided that ſome Miniſters and Eccleſiaſticall perſons ſhould have precedency of others; 1. In reſpect of the perſons

of Dignity upon whom they were attendants. 2. In respect of their births and bloods. 3. In respect of their Degrees which they have taken within the two Universities of this Realm. And therefore, 1. The Chaplains of the King, Queen, Prince and their Children may have as many Benefices with Cure of Souls, as it shall please the King, Queen, or their Children to confer upon them, of any value whatsoever. So every Archbishop may have eight Chaplains, because he must use eight at the Consecration of every Bishop: every other Bishop four Chaplains; every Duke, Dutchess, Marquess, Earl, Countess, Baron, or Baroness Dowager two Chaplains; every Knight of the Garter three Chaplains, and every one of their Chaplains may purchase a Dispensation to have and hold a Plurality or two Benefices of Cure of souls of any value whatsoever. So 2. the Brethren and Sons of all Temporal Lords born in Wedlock, may have Licence or Dispensation to take, and keep as many Benefices as the Chaplains of a Duke, or Archbishop; the Sons and

and Brethren of every Knight may purchase Dispensation to receive and take two Benefices with Cure of Souls: 3. In respect of their Degrees: So all Doctors and Batchellors of Divinity, Doctors of Law, and Batchellors of the Canon Law, who are admitted to their Degrees by the Universities, and not of Grace, may purchase Licence or Dispensation to have, and keep two Benefices with Cure of Souls. Insomuch that if we consider of the Nobility now in *England*, the Offices of Honour and Place, the Sons and Brethren of Noblemen and Knights, and other deserving men within the Realm who have taken the Degrees aforesaid: it cannot be thought but that all, or the most part of the Clergy men within the Realm of *England*, have at this day or may have Plurality, or two Benefices with Cure of Souls within the said Statute of 21. H. 8. Again, if we look upon the Parochial Churches within the Realm; the Dignities of Archdeaconries, Deaneries, Prebendaries, and other Ecclesiastical

cal Dignities and Promotions given to persons within the Realm; it cannot be imagined, but that all Scholars, Ministers, and other Ecclesiastical persons within the Realm, of Learning and Merit, are now better provided for by this Law of 21. H. 8. then they were in antient times, when Dispensations for Pluralities, Commendams, and Faculties were granted, and obtained by the Clergy of *England* from the Bishop of *Rome*.

CHAP.

CHAP. XXIII.

What Right or Interest the Parson or Vicar have to the Church: Of the Rights of the Patron and Ordinary: In whom the Fee simple of the Gleab of the Parsonage and Vicarige is: Who shall be said to be the Patron of a Vicarige endowed: What Actions the Parson and Vicar may have for the Freehold of the Church and Gleab. And whether a Juris utrum *will lye by the Vicar against the Parson for the Gleab of the Vicarige.*

BY degrees I have brought the Clark presented not only into the real possession of one Church or Benefice with Cure, but have shewed unto you, that if he be Qualified within the Statute of 21. H. 8. how that he may purchase Licence, or Dispensation to take and receive plurality, or two Benefices with cure of Souls.

Now it remaineth that I do declare unto you, what Right or Interest

reſt the Parſon or Vicar have in the Church or Gleab Lands after their Inductions into the ſame, and what Right and Intereſt the Patron and Ordinary likewiſe have in the ſame.

Their Rights unto the Advowſon and to the Church, and Gleab Lands thereunto belonging, are of ſeveral Natures. The Parſon, or Vicar hath *Jus poſſeſſionis*, a right unto the poſſeſſion of the Church and Gleab, for that the Parſon hath in himſelf the Freehold, and is to receive the profits of the Church and Gleab, and the Oblations, Tythes and Offerings to his own uſe. The Patron hath *Jus preſentationis*, the right of preſentation of his Clark unto the Ordinary to be admitted, inſtituted and Inducted into the Church. The right of the Ordinary is *Jus Ordinationis*, a right of enabling and inveſture of the Incumbent, and to ſee the Cure to be ſerved: The Parſon hath *Jus habendi*, *Jus retinendi*, *Jus poſſidendi*: He may have, poſſeſs and retein the Profits, Tythes, Obventions and Offerings to his own uſe, without the Patrons, and Ordinaries conſent, and nothing can be done by them

themduring his incumbency to charge the Church, or his Succeſſor without his conſent and agreement: But the Rights of the Patron and Ordinary are only Collateral Rights; for that none of them can have, retein, or poſſeſs the Church or Gleab themſelves: And yet the Patron and Ordinary have *Jus diſponendi*, a kind a Diſpoſition in the Church. For that no charge could have been laid upon the Church in perpetuity to have bounden the Succeſſors of the Parſon, unleſs the Patron and Ordinary had agreed thereunto. And therefore, if a Writ of Annuity had been brought againſt the Parſon, and he had prayed in aid of the Patron and Ordinary, and the Patron had made default, and the Ordinary had appeared and confeſſed the action; Or if the Ordinary had made default, and the Patron had confeſſed the action; this ſhould not have bounden the Parſon or his Succeſſor. But if they had both appeared and pleaded nothing, by the Common Law this ſhould have bounden the Church in perpetuity: for that *Qui tacet Conſentire videtur.*

12. H. 8. 7.
19. H. 6. 75.
21. H. 6. 5. & 8.
39. H. 6. 40.
p. 14.
28. H. 6. 1. & 2.

But

16. E. 3. Annuity, 24. 20. E. 3. Annuity 32. 7. E. 4. 40. 40. E. 3. 30. Cook 1. part, Instit. 343.

But if the Parson himself, with the consent only of the Ordinary had granted unto another man an Annuity out of the Gleab, have *quid pro quo*, in consideration thereof: This should have bounden the Successor of the Parson at the Common Law without the consent of the Patron. Also in some Cases the Action of the Patron himself alone would have bounden the Incumbent: and therefore if a recovery had been by action tryed against the Patron where the Right of the Patronage had been in question: there the present Incumbent should not have put the Right again in tryal, but he should have been bounden thereby by the Common Law; nor was he helped herein by the Statute of 25. E. 3. cap. 7. if the Patron had not pleaded faintly; but the Parson should have been bounden by the Judgement: yet by the opinion of Mr. *Fitzherbert*, in his *Natura Brevium* 49. a. saith, that the Successor of the Parson, after such a Recovery had against his Predecessor by action tryed, might have had a Writ of *juris utrum*, notwithstanding such Recovery: *vid.*

38 E. 3. br. Qu. Imp. 66. 38. E. 3. 31. acc. adjudged,

7. H. 6. 36.

7. H. 6. 36. That the Parſon ſhall not have a Writ to the Biſhop, if it be found for him, if the Patron made default: But the Parſon himſelf as I ſaid before, hath the Freehold in him, and hath the Right of the Church, Church-yard and Gleab in him: of which, if he be put out of poſſeſſion, or diſſeiſed, he may have an Aſſize; *vide* to that purpoſe 28 H. 6. 19. by *Markham*: if the Parſon be ejected, he ſhall have Treſpaſs, or he may have an Aſſize if diſſeized of his Church-yard: and ſo alſo may the Vicar have againſt a ſtranger if he be diſſeiſed thereof, but not againſt the Parſon himſelf: as the book of 13. R. 2. Fitz. tit. Juriſdiction 19. is: For it is agreed in 11. H. 4. 12. That of ſuch things as are annexed unto the Church or Gleab, or for cutting down of the Trees, or doing of Treſpaſs in the Church-yard, or Gleab, the Parſon ſhall have an Aſſize, or an action of Treſpaſs, for that the Right and Intereſt of them is in the Parſon. But for the Ornaments of the Church, or for the Bells in the Steeple, the Parſon ſhall not have the Action if they be

17. H. 3. Prohib. 26.

11. H. 4. 12. acc.

be taken away, but the Church-wardens.

If a Seat be set in the Church, and afterwards the same be taken away by a stranger, the Parson shall not have the Action; and the reason thereof is, because the same is not fixed to the Freehold; but in such case the Action is given to the Church-wardens, or to the party unto whom the Seat doth belong and appertain. 8 H. 7. 12.

If the Coat Armour, Pendants of Arms, or Scutcheons of Arms of any Noble man, or Gentleman, that are hung in the Chancell, or in the body of the Church in honour of the party buried there, be taken down, or carried away by the Parson, or Vicar, an Action will lie against them by the Heir or Executor of the party deceased; For these are no Obligations that belong to the Freehold of the Church: But such is the Interest of the Parson in the Freehold and Gleab of his Church, as before is said, that he shall, and may have an Assize thereof: and if he be impleaded in any Action real of the Freehold, he shall have

aid

aid of the Patron and Ordinary.

But the Freehold being in the Parson, it hath been much controverted in our Books, in whom the Feesimple of the Gleab of the Parsonage and the Vicarige is; 1. Some authorities are, and some are of opinion, That the Parson hath the Feesimple of the Gleab in him, and that for these reasons, *viz.* 1. They say, That a Parson is a Spiritual Corporation, and Lands may be given unto him in Frankalmoigne; and every gift in Frankalmoigne, settleth the Fee-simple in the Donee, and supposeth a Feesimple to pass. 2. They say, That the Parson hath brought a Writ of Right in the nature of a *Quod permittat* of a Common, and counted, that he was seised in *fee & droit*, and the Writ hath been admitted good by the Judgement of the Court. See to that purpose 31 E. 3. Fitz. *Quod permittat*, 8. and *Fitz. Natura Brevium* 50. R. See also *Temps* E. 1. title *Quod permittat*, 9. where a Parson brought a *Quod permittat* of the seisin of his predecessor of Estovers, and counted of a seisin in fee, and joyned the mise upon thee meer right, And

it is said by *Paston* in 8 H. 6. 24. That a Parson may joyn the mise upon the meer right; If the Parson dieth, the freehold of the Gleab is not in the Patron; neither can any Action be brought for the Gleab untill there be another Parson. And it is the better opinion of the book of 8 H. 6. 24. That if a *Precipe quod reddat*, or a *Scire Facias* to execute a recovery in a Writ of *Cessavit*, he shall not have Aid. 3. They say, That if the Parson doth make a Lease for his own life of any part of the Gleab, that he hath a reversion in him and may be vouched; and this appeareth by the Book of 9 E. 3. Fitz. title Aid. 19. Where in a *Formedon* brought against J. S. the tenant pleaded, That W. was Vicar of the Church of S. and made a Lease to him for life, and vouched the Vicar, who entred into warranty, and pleaded, That he found the Church seised of the Lands as parcel of the Gleab of the Vicarige; and that A. was Parson of the Church and prayed in Aid of him, and the Aid was granted; by which case say they, it appeareth, That *Voucher* and *Aid-prayer* shall be had against

9 E. 3. *Juris utrum* 18.

againſt a Parſon. 4. They ſay, That the Feeſimple is in the Parſon, and not in the Patron, for that the words of the Writ of *Juris Utrum* are, *utrum ſit libera Eleemoſyna Eccleſiæ de D.* and not of the Patron. But notwithſtanding theſe reaſons and authorities above mentioned, I conceive the Law to be, that the Parſon hath not the abſolute Feeſimple of the Gleab in him, and at the leaſt, but a qualified Feeſimple, and that the abſolute Feeſimple of it according to the opinion of Mr. *Littleton*, is in abeyance, or in *Nubibus*, that is to ſay, in the intendment, or conſideration of the Law; and it was provided, that it ſhould be ſo, by the wiſdom and policy of the Law, that the Parſon and Vicar, who have *Curam animarum*, and are bound to celebrate Divine Service, adminiſter the Sacraments, and the like, might have ſomewhat to live upon; and therefore the Law provided that the Feeſimple of the Gleab ſhould not be in them, but rather out of them, that no alteration or diſcontinuance thereof by the preſent Incumbent might be a bar unto the Succeſſors, and ſo leave

them destitute without a convenient maintenance; and for that they could not by the wisdom and policy provided as aforesaid, alien or discontinue the Gleab lands (for any discontinuance did give a fee) it necessarily followeth, that the absolute Feesimple of the Gleab was not in them. Neither could the Parson have or maintain a Writ of Right of Advowson, or other Writ grounded upon the meer Right; which is a manifest proof that he hath not the absolute Feesimple of the Gleab in him.

43 Ass. 13. An Assise of *Novel disseisin*, was brought against a Parson of part of his Gleab lands: he pleaded, That he was presented to the Church by the King, and prayed an Aid of the King, and the Aid was granted; and Aid shall never be granted to one who hath the absolute Feesimple of the Lands in him.

8 H. 6. 26. 19 H. 6. 39. 10 H. 6. 5. Cook 6. part, in *Ferrers* Case. If a Writ of Right be brought against a Parson, and after the mise is joyned he makes default, and Judgement be given against him upon his default; this shall not bind the Successor, but the successor shall have a *Juris Utrum*, because the Parson did not pray

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in Aid of the Patron and Ordinary; and he had not the meer Right in him to lose by his default; and in that case, the Parson himself might have had a Writ of *Juris Utrum*, notwithstanding the bar in the former action; for that is his Writ of Right, and a Writ of the highest nature that a Parson can have. Vi. Lit. sect. 646.

Vacariges where originally endowed out of Parsonages, and the Vicar was to have Aid of the Parson if he were impleaded for any thing which concerned his Vicarige, and the Parson was subject to every charge of the Vicarige; and the Vicar in antient time was not esteemed the Tenant of the Freehold of the Gleab of the Vicarige, but the Freehold thereof was in the Parson, and the Vicar himself was not such a Parson against whom the Lands of the Vicarige could be demanded; neither did any Precipe lye against him as Vicar, nor could he maintain an Assise in his own name. 31 H. 6. 13. by *Yelverton*. 9 Ass. 3. 40 E. 3. 27. 8 Ass. 36. 15 Ass. 8. acc.

12 E. 3. Fitz. tit. Brief. 256. in an Assise brought against a Vicar, he pleaded, That he had nothing but as Vicar, and demanded Judgement of

the Writ, the Plaintiff said, That he was seised untill he was disseised by him; and that it was holden, That if he had found the Vicarige seised, that then it was a good plea: But in that case it was holden and agreed, That a Vicar should not have an Assise in his own name. But yet I finde in 4 E. 3. title Brief. 704. A Writ of Intrusion was brought against a Vicar, who pleaded unto the Writ, That the Freehold was in the Parson, and notwithstanding that plea, the Writ did not abate. But the reason of that Case might be, for that the Intrusion was a tortious act, and a personal wrong, and therefore the person of the Vicar was charged therein and therewith; and yet in that case, the Vicar had Aid of the Parson and Ordinary, by which it appeareth that the Freehold was in the Vicar himself, but not the Feesimple of the Gleab of the Vicarige. And I hold the Law to be, That the Freehold of the Gleab of the Vicarige is in the Vicar himself, and not in the Parson, for that the possessions of the Vicar and Parson are severed, and every of them shall have several Writs

Writs concerning the Rights which do appertain unto them, and ſhall not joyn in one Writ; and they ſhall pay their Tenths and other charges lyable upon their ſeveral Gleab Lands ſeverally by themſelves; and the Vicar at this day ſhall have and maintain a Writ of *Juris Utrum* againſt the Parſon, who is the Patron of the Gleab of the Vicarige for the ſame Gleab: by all which it appeareth unto me, that the Freehold thereof is in the Vicar upon his firſt endowment; and that for the abſolute Feeſimple of the Gleab of the Vicarige, the ſame is in the Intendment and Conſideration of the Law *in Nubibus*, as the Feeſimple of the Gleab of the Parſonage, as in Caſe of the Parſon, as before is ſaid.

Before I conclude this Chapter, it will not be impertinent concerning the Right of Patronage to determine a Queſtion made in our Books, which is this, *viz.* If there be Parſon and Vicar endowed in one Church, and the Vicarige becomes void; who ſhall be ſaid to be the Patron of the Vicarige? whether the Patron of the Parſonage, or the Par-

son? In 17 E. 3. 51. Some of the Judges are of Opinion, That the Advowson of the Vicarige doth appertain to the Parson; Others, That it belongeth to the first Patron; and the Court is divided in Opinion, Mic. 16 E. 3. Fitz. Qu. Imp. 145. by *Parninge* and *Hill*, they encline that it is in the Patron; for there they say, that the Ordinary cannot make a Vicar without the Assent of the Patron.

5 E. 2. Qu. Imp. 165. puts the Case, That although the Vicarige be endowed with the assent of the Patron and Ordinary, yet the Advowson of the Vicarige doth remain in the Parson, because the same is parcel of the Advowson of the Parsonage.

17 E. 3. Grants 66.
13 R. 2. Jurisdiction 19.
16 E. 3. *Mans defaults* 166.

16 E. 3. Grants 56. it was a Question, if by the Grant of the Advowson of the Church, the Advowson of the Vicarige did by-pass; and there it is said by *Stone*, That it doth pass as incident to the Parsonage.

Mic. 31 Eliz. C. B. *Ashgell* and *Dennis* Case. *Vide* Leon. Reports. Rep. 1. p. 191.

In Mich. 31 Eliz. in C. B. there was a Case between *Ashgell* and *Dennis*, which was this, *viz.* The King was seized of the Rectory of D. and

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of the Advowſon of the Vicarige of D. and by his Letters granted to I. S. *Rectoriam prædictam cum pertinentiis, ac etiam Vicariam Eccleſiæ prædict.* In that caſe, it was reſolved by all the Juſtices of the ſaid Court, That by thoſe words, the Advowſon of the Vicarige did not paſs: But if the King had granted *Eccleſiam ſuam de D.* the Advowſon of the Vicarige had paſſed.

31 H. 6. 13. and 14. by *Hengiſton*, The Parſonage and Vicarige are all but one, and he who is Patron of the Parſonage, is Patron of the Vicarige; and *Forteſcue* there doth agree the ſame; But notwithſtanding thoſe Authorities, I conceive firſt, that *de jure*, the Parſon is Patron of the Vicarige, unleſs upon the Endowment by the Ordinary it be otherwiſe provided: and ſo ſaith Mr. *Fitzherbert* in his N. B. 33. That the Preſentation to the Vicarige doth belong unto the Parſon of Common Right, if it be not otherwiſe agreed unto. 2. H. 3. Grants 89. & *Perkins* 123. If a man grant by Fine the Parſonage, ſaving the Preſentation to the Vicarige, it is a good ſaving,

saving, and the Parson shall present when the same is void. 2. Common Experience is, that where there is an Appropriation, and a Vicar endowed, that the persons to whom the Appropriation was made, were alwayes accounted Patrons of the Vicarige: And 50. E. 3. 26. an Abbot who had an Advowson appropriate, upon which there was a Vicarige endowed, did present unto the Vicarige, wherewith agreeth the book 17. E. 2. Qu. Imp. 178. 3. It is manifest by reason; for as the Patronage of the Church doth appertain unto him who was the first Founder of the Church, and endowed the same with Lands: so in regard that the indowment of the Vicarige is taken out of the Parsonage, and out of the estate of the Parson, and if he be impleaded of his Gleab, he shall have aid of the Parson: and also if the Vicarige be diminished, the Ordinary may increase the Endowment of it out of the Parsonage, as the Book of 31. H. 6. 18. is; it is but reason that the Parson have the Patronage of it: Again, the Vicar is Substitute to the Parson, and his

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Endowment at the first either of Lands or other things was only as a maintenance for him, in Officiating the Cure for the ease of the Parson; and also that it belongeth to the Parson to see that there be a fit able and honest man, of whose Care, ability, and Learning he may be assured, sufficient to Officiate the Cure; Therefore it standeth with good reason, that the Parson be his Patron, and present such a one to the Vicarige as shall be sufficient, and of ability to serve the Cure. And therefore, notwithstanding the former Authorities, I conceive, that the Patronage of the Vicarige doth *de jure* belong unto the Parson, and not to the first Patron of the Parsonage Appropriate.

CHAP.

CHAP. XXIV.

Of Usurpation, and where the same shall put the Rightfull Patron out of the possession of the Church, or his Advowson; where not.

I Have in the former Chapter considered the Rights of the Patron, and Ordinary, and of the Incumbent, and what remedy the Incumbent hath, if he be ousted, or disseized of his Church, or Gleab Lands. Let us now return to the Patron, and see by what, and whose acts the Patron may be ousted of his Advowson, or presentation to the Church. I said before, That Patrons might be put out of their Advowsons by Disseisins, Discontinuance of the Mannors or Lands to which the Advowsons were Appendants, and by Usurpations, of Disseisins, and of the Discontinuance of the Mannors and Lands, and where the Patron shall present before his entry, or that he recontinueth the Mannors, &c. I have shew-

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ed in a former Chapter. I ſhall in this ſet out and declare where an Uſurpation ſhall put the rightful Patron out of the poſſeſſion of the Church, or Advowſon, where not.

Uſurpation is where a ſtranger who hath no title to the Advowſon, the Church being void, doth preſent his Clerk to the Biſhop or Ordinary, and the Ordinary doth thereupon admit and inſtitute the Clerk preſented to the Church which is then void; this preſentation is a Diſturbance and Uſurpation, and doth put the Rightful Patron out of the poſſeſſion of the Church. And this appeareth by the Statute of Weſtm. 2. cap. 5. *Cum aliquis jus præſentandi non habens, præſentaverit ad aliquam Eccleſiam, cujus Præſentatus ſit admiſſus.* For no man can be put out of the poſſeſſion of an Advowſon, but upon Admiſſion and Inſtitution, upon a Preſentation onely. For if a Biſhop doth Collate unto the Church without title, and his Clerk be Inducted, this doth not put the Rightfull Patron out of poſſeſſion, as it was adjudged, Mic. 30 Eliz. in Co. Banco, in *Fourdens* Caſe: For that it ſhall be

14. H 7. 2. acc. be taken only to be provisionally made for the Celebration of Divine Service, untill the Patron doth present.

Pasc. 30. Eliz. C. B. the Queen and Bishop of *Yorks* case. Leo. Rep. 226. Pasc. 30. Eliz. in Co. B. in the Case between the Queen and the Bishop of *York*, it was holden by all the Justices thus, That Collation cannot gain any Patronage, and cannot be an Usurpation in the case of a common person; *à fortiori*, not against the King: and there it was said, that Collation was the giving of the Church to the Parson. Presentation is the offering of the Parson to the Church: And *vid.* 35. H. 6. 61. The King may gain a Presentment by wrong, although he may not properly be said to be an Usurper or a Disseizor.

At the Common Law, every presentation to the Church did put the Rightfull Patron out of possession of it, and put him to his Writ of Right of Advowson; whether the presentation was by title, or without title; and therefore at the Common Law, if A. being seized of a Manner to which an Advowson was appendant, had levied a Fine thereof to B. and his

8 E. 2. Qu. Impedit. 168.

his heirs, and afterwards the Church had become void, and A. had afterwards presented by Usurpation his Clark to the Ordinary, who had been admitted, Instituted and Inducted; this should have put the Patron out of possession: and therewith agreeth the book of 8. E. 3. Qu. Imp. 25. and there it is said that the party must traverse the presentment, and not the Appendancy; for the presentment by the Usurpation put him out of possession, which is the principal matter of title: And so it was, if A. had recovered against B. an Advowson in a Writ of Right of Advowson, and had final Judgement, and afterwards the Incumbent had dyed, and B. by Vsurpation had presented his Clark to the Church, who had been admitted and instituted, and afterwards B. had dyed, this should put A. out of possession, and the heir of B. should not have been bounden by the Judgement, either in blood or estate but he should have presented; and the reason of both the said cases was, because every presentation did put the Lawful Patron out of possession, and therefore albeit

8. E. 3. Qu. Imp. 25. *V.* 22. H. 6. 85. 21. E. 4. 15.

45. E. 3. Qu. Imp. 139.

Cook 1. part, Instit. 238.

beit in both the said cases, the Usurpation was before Execution; yet the Rightful Patron was thereby put out of possession of his Church, and the Usurper had gained the inheritance of the Advowson thereby, and the presentment of the Rightful Patron *pro hac vice*, lost for ever.

44 E. 3. Qu. Imp. 139. acc.

At the Common Law, if an Usurpation had been made upon an Infant, or a *Feme Covert*, they had been put out of possession, and had been put to their Writs of Right of Advowson; and the reason thereof was, because (it was said) the Incumbent came in by judicial act of the Ordinary, *viz.* by Admission and Institution; and it was presumed, that the Ordinary would not have done any wrong, or have assented to any wrong to have been done, which might be to the prejudice of the Church: and so it was, if they had purchased an Advowson, and an Usurpation had been upon them during their infancy or coverture, it had put them out of possession, and they had not been helped by the Statute of West. 2. cap. 5. But yet at the Common Law, if one had usurped upon the

31 E. 1. Qu. Imp. 186.
6 E. 3. 28.
39 E. 3. 24.
43 E. 3. 15.
50 E. 3. 13. b.

V. 35 H. 6. 60.
1 E. 3. Qu. Im. 43.
5 E. 3. 50.
43 E. 3. 15.

the poſſeſſion of the King, and his Clerk had been admitted, inſtituted and inducted, this ſhould not have put the King out of poſſeſſion of his Advowſon, by reaſon, *Nullum Tempus occurrit Regi* by his Prerogative; but the King might have recovered his preſentment in a *Quare Impedit* brought by him, for that the King was not bounden by the Plenarty; and alſo becauſe that the words of the Statute of Weſtm. 2. are, *per fraudem & negligentiam*: and ſo the King out of the ſaid Statute; and yet in ſuch caſe without a *Quare Impedit* firſt brought, the King could not have removed the Incumbent out of the Church.

18. E. 3. Qu. Imp. 151. Cook 6. part, in *Boſwels* Caſe. acc.

35. H. 6. 60.

A Writ of Error was brought in B. R. to reverſe a Judgement given in a *Quare Impedit* in the Court of Common Pleas; The Queſtion there was, Whether a Double Uſurpation ſhould put the King out of poſſeſſion of his Advowſon, and put him to his Writ of Right of Advowſon; it was there adjudged, that it was. And now Error was brought, and the Error was aſſigned in the matter of Law: and after many Arguments

Trin. 4 Jac. in B. R. the King and *Champions* caſe. Cro. 2. part, 123.

and Motions made, it was resolved in this case, That the King might maintain a *Quare Impedit*, for that he hath such a priviledge, that as he cannot be put out of the Inheritance of his Advowson, unless by his own grant, so he cannot be of an Advowson. But an Usurpation and Plenarty upon it shall bind as to the possession untill he remove the Incumbent by a *Quare Impedit*; and so it was said it was adjudged 38 Eliz. in *Hussies* Case. And although it was said and objected, That in *Yardleys* Case, Pasc. 25 Eliz. in Co. B. it was adjudged, That by two Usurpations the King might be put out of possession, and put to his Writ of Right of Advowson. It was said to that Case, That the Record did not mention any induction upon the second presentment; so as there was not any plenarty against the King. And *Popham* and *Tanfield* Justices said, That they well remembred that the said *Yardleys* Case was well argued, as if there had been an Induction; But in the Case at the Barr, it was agreed by all the Justices, That the said Double Usurpation (if it was such) should not put

38 Eliz. C. B. *Hussies* Case.

Pasc. 25 Eliz. C.B. *Yardleys* Case.

47 E. 3. 4 b. acc.

put the King out of poſſeſſion: and thereupon the Judgement given in the ſaid Caſe in the Court of Common-Pleas was Reverſed.

If the King hath an Advowſon in the right of his Ward, and a ſtranger uſurps and preſents, and his Clerk is in by ſix moneths before the King brings his *Quare Impedit*, yet this Plenarty ſhall be no good barr againſt the King; and the reaſon thereof is, becauſe the King ſhould be otherwiſe without remedy: For a Writ of Right of Advowſon he cannot have, he having an eſtate in the Advowſon but as Guardian; and therefore in that caſe *Nullum Tempus occurrit Regi*; for elſe a ſtranger ſhould hold a thing only by wrong, againſt him without any ground; yet in that caſe, the King ſhall not put out the Incumbent without a *Quare Impedit* brought: For ſo it is provided by the Statute of 13 R. 2. cap. 11. But if the King hath title to preſent by reaſon of Lapſe, and the Patron doth uſurp, & preſents his Clerk who is admitted, inſtituted and inducted, & then dyeth, the King in ſuch caſe hath loſt his preſentation, and ſhall not have

Stamford *fol.* 33. acc.

Cook 7. part. *Baskervile's* caſe.

the second presentation by his Prerogative; for there *Tempus occurrit Regi*: and the Kings interest was specially limited, and the six moneths was the substance of this Title.

Upon presentation to an Advowson, the interest of the presentor is to be considered: For in some cases, an Usurpation, although it seemeth to be by Usurpation, shall not put the rightfull Patron out of Possession: and therefore if a man be seized of an Advowson in Fee, and grants three Avoydances unto one man, one after the other, and the Church becomes void, and the Grantor himself presents his Clark, who is admitted, Instituted and Inducted, and afterwards the Church doth become void again, the Grantee shall present to the second Avoydance, for that he was not put out of possession by the first presentment; For the Grantor had the Franktenement and the Fee of the Advowson in him, so that he could not make any Usurpation, to gain any estate to put the Grantee out of possession: and also in respect of the privity of the contract betwixt the Grantor

Cook 1. part. Instit. 249.

Grantor and the Grantee, the presentation of the Grantor upon the first Avoydance, though it seemed to be a kind of Usurpation, yet the same did not put the Grantee out of the possession, or the interest which was in him of the two last Avoydances.

If two Coparceners be of an Advowson, and they make composition to present by Turns, and the one of them doth usurp, and presents in the Turn of the other; this usurpation doth not put the other out of possession; And so it is, if two joynt-tenants be of an Advowson, and the one presents his Clark, who is Instituted and Inducted, this doth not put the other out of possession.

22. E. 4. 4. 12. H. 8. 1. in *Kelloway.* 6 E. 3. Qu. Imp. 39 acc. 35. H. 8. Br. 370. 17 E. 3. 37. b. 15. E. 3. Darrein presentment, 11. 2. R. 3. Qu. Imp. 102.

In 20 E. 3 tit. Qu. Imp. 63. there two Joynt-Tenants were of an Advowson; and one of them brought a *Quare Impedit* against the other: and counted of an Advowson in common betwixt them; It was there said by *Schard*, that this Writ will not lye: but an Assize of *Darrein* presentment doth more properly lye: But in that Case it was a-

agreed, that the Defendant could not have a Writ to the Bishop, because he did not make title to the Advowson.

But in the Case which before is put, if the Joynt-tenant that presented dyeth, his presentation shall serve for a title in a *Quare Impedit* brought by the Survivor.

V. 11 H. 4. Qu. Imp. 119. 27 H. 8. 11. &c.

If an Advowson be granted to one for life, the remainder to another in Fee, and the Tenant for life dyeth, and afterwards a stranger usurps, and the six moneths pass, in this case he in the remainder was without remedy by the Common Law, for that he could not have a Writ of Right of Advowson: for that Writ was not maintainable but of his own possession, or his Ancestors; and an Assize of *Darrein* presentment, or *Quare Impedit* he could not have, because the six moneths were past: and so although he had the Right of the Advowson in him, yet this usurpation should have bounden him, and gained the possession from him, for that he had not any action for the recovery of his Right. And so it was if a Tenant for life of a Mannor to which an Advowson is appendant

appendant, had ſuffered an uſurpation, and the Tenant for life dyed, he in the remainder had no remedy for this uſurpation. And although the words of the Statute of Weſtm. 2. cap. 5. are, *Habeant eandem actionem & recuperationem per Breve de Advocatione poſſeſſorium, qualem haberet ultimas Ante-Ceſſor.* Yet at this day, I do conceive the Law to be, That they ſhall be aided by the Statute of *Weſtm.* 2. notwithſtanding this uſurpation upon the Tenant for life.

7 R. 2. *Statham.* Qu. Imp. 34. it was admitted for Law, That if a Tenant for life ſuffereth an uſurpation, he in the Reverſion ſhall avoid it after the death of the Tenant for life; Notwithſtanding that the Book of Mich. 16 E. 3. *Qu. Imp.* 67. is, That a Purchaſer ſhall not avoid a preſentation had againſt his Feoffor.

45 E. 3. by *Finchden*, if a ſtranger uſurpeth upon any Tenant for life, and afterwards the Tenant confirms his eſtate in Fee, and the ſtranger preſenteth two or three times, and the Tenant for life dyeth; and afterwards

terwards the Church becomes void, I shall present, and upon any disturbance I shall have a *Quare Impedit*; for the Statute of Westm. 2. being made for to suppress wrong doing, shall be taken largely: and so it was adjudged in the Court of Common Pleas, Pasc. 14. Jac. Rot. 1030. in the Lord *Stanhope* and *Williams* case, where the case was, that a Prior did grant the next Avoydance, and the Grantee suffered an usurpation; and it was adjudged, that the Prior himself might have been aided by the Statute of Westm. 2. cap. 5. and had a *Quare Impedit*; and so was the Law taken to be for every Lessee upon an usurpation had upon his Lessor.

Pasc. 14. Jac. rot. 1030. in Co. B. Lord *Stanhope* and *Williams* case.

And *vid.* 44. E. 3. Qu. Imp. 134. by *Belknap* and *Finchden*, if one be Tenant for life of an Advowson in gross, and a stranger presents, and tenant for life confirms it, & then the Tenant for life dyeth, & the Church becomes void again, he in the Reversion may have a *Quare Impedit.*

44. E. 3. Qu. Imp. 134.

Again, the time of an usurpation is also considerable; if an usurpation be had upon one to an Advowson

7. R. 2. Dars. presen. 2. 28. E. 3. Qu. Imp. 175.

ſon in the time of War, this uſurpation doth not put the rightful Patron out of poſſeſſion, although the incumbent be inſtituted and inducted in the time of peace: for the Law reſpects and looks back upon the original act which is the Preſentment; and the ſame being in time of war, the war doth not only give priviledge to them which be in the War, but to all others within the Kingdom; and therefore although that the admiſſion and inſtitution be in time of peace, yet the preſentment being in time of War, the ſame doth not put the Lawful Patron out of poſſeſſion: So if an uſurpation be upon an Abbot, or Biſhop (*ſede vacante*) this uſurpation ſhall not prejudice his Succeſſor, but that he ſhall have a *Quare Impedit*, and thereupon ſhall remove the incumbent, and ſhall preſent, but if ſuch an uſurpation had been in the time of his predeceſſor, this ſhould have put the Succeſſor out of poſſeſſion, if the ſix-moneths were paſt. 9.E.3.16.acc.

If the Patron of a Benefice be Outlawed, and the Church doth become

V. Mic. 29. Eliz. in Co. B. *Beverly* and *Cornwals* caſe acc. Leon. 1. part. 63.

come void, ſo as the title of preſentment is come to the King, in regard of the Outlawry, and a ſtranger uſurps upon the King, and the ſix moneths paſs, and the King brings a *Quare Impedit* and removes the incumbent, now is the Advowſon recontinued to the rightful Patron; and the uſurpation whileſt the title was in the King, did not gain the inheritance of the Advowſon out of the Rightful Patron, but that he after the Outlawry reverſed, or pardoned, may preſent, if the Church doth become void. But yet the Rightful Patron may deſtroy his own title, and give away his right unto an uſurper by his own act, and make the preſentation by the uſurpation good: as if two men preſent by uſurpation to a Church, and their Clark be admitted, inſtituted and inducted, the Patron may releaſe his right in the Advowſon to one of them, and thereby deſtroy his own title, and the ſame is good, and as to the preſentment ſhall enure to the Clark of them both, and ſhall enure to eſtabliſh the Clark in the poſſeſſion of the Church, for that the

the Clerk comes in not meerly by wrong, but by admiſſion and inſtitution of the Ordinary, which are Judicial and Lawful acts: and in ſuch caſe he to whom the releaſe was made, ſhall not now put out the Clark, although he hath now better title to the Advowſon: But the Clark ſhall be now ſaid to be in by them both, and his title good, by this releaſe of the rightful Patron.

CHAP. XXV.

What Remedy the Patron hath for to recover his Advowſon, or Preſentment upon an Uſurpation. And of the Writs of Droit de Advowſon. *Aſſize* de Darrein Preſentment, *and* Quare Impedit.

IF an Uſurpation be had upon the Patron of his Advowſon, or if he be diſturbed in his preſentation, the Church being void, the Law hath provided ſeverally Writs & Remedies for the Recovery of the Advowſon, and for the removing of the incumbent:

incumbent: The Writs which the Law hath given to the Patron, is either a Writ of Right of Advowſon, An Aſſize of *Darrein.* preſentment, or a *Quare Impedit*; the firſt is a Writ for the Recovery of the Right of the Patronage, the other two are Writs concerning the poſſeſſion.

Mic. 13. Jacob. in Co: B. it was holden, that if a man doth preſent by uſurpation to my Advowſon within the ſix moneths, I may have a *Quare Impedit*: But after the ſix moneths paſt, I am put to my Writ of Right of Advowſon: ſo if one uſurpeth upon the King, the King is put to his *Quare Impedit* within the ſix moneths, and upon a double uſurpation, he is put to his Writ of Right: *Quere* this caſe, for that is contrary to the Reſolution of the Juſtices in the caſe between the King and *Champion*, which before *vide* in the precedent Chapter.

V. Glan. H. 6. cap. 7. lib. 13. cap. 20, 21. acc.

The Writ of Right of Advowſon, is a Writ of the higheſt Nature that the Patron can have: it is ſuch a Writ wherein he may try his Right either by Battail or by Grand Aſſize:

Assize: and it lyeth only for him who hath a Fee-simple in the Patronage, and doth not lye for him who hath but only an estate in tail, or any other inferiour particular estate.

If a man hath an Advowson to him and the heirs of his body, and for want of such issue, to the remainder to him and his heirs, if an usurpation be had upon him, he shall not have a Writ of Right of Advowson, and recover the simple: and that appeareth by the Book of 4. E. 3. 48. by *Wilby*, where such a Tenant in tail brought a Writ of Right, and recovered but an estate in tail: But yet such a Tenant in tail may have an Assize of *Darrein* Presentment or a *Quare Impedit* at his Election. And in this Writ the Plaintiff must count either of his own possession of the Advowson, or of the possession of some of his Ancestors. For if a man purchaseth an Advowson to him and his heirs, and afterwards the Church becomes void, and then a stranger that hath no right to present, presents to the Avoydance, and his Clark be instituted and inducted, 21. E. 4. 1.

ducted, and afterwards the Church doth become void again, there the purchaser by this usurpation is put out of possession of the Church, and cannot maintain a Writ of Right of Advowson, because therein he cannot Count of his own possession, or of the possession of any of his Ancestors.

14. H. 6. 15. b. There is some difference in the form and frame of the Writ of Right of Advowson. For it is to be known, that there is *Advocatio Medietatis Ecclesiæ*, and *Medietas Advocationis Ecclesiæ*. *Advocatio Medietatis Ecclesiæ* is, where there be two Patrons of one Church, and each of them hath right to present a several incumbent, one to the one moyetie of the Church, and the other to the other moyety thereof; and therefore in such case, if an usurpation be had upon any one of them, or he be disturbed in his presentment, he shall have his Writ *de Advocatione Medietatis Ecclesiæ*, or *Quare Impedit præsentare ad Medietatem Ecclesiæ*: But *Medietas Advocationis Ecclesiæ* is, where two Coparceners be of an Advowson, and they make composition pre-

preſent by Turns, here each of them in truth hath a right but unto the moiety of the Church, for that there is but one incumbent of the ſame. And if one of them be to bring a Writ of Right upon an uſurpation, the Writ muſt be, *De Medietate Advocationis Eccleſiæ.* But if one of the ſaid Coparceners at her Turn be diſturbed in her preſentment, ſhe may bring a *Quare Impedit* upon the ſame diſturbance; and the Writ may be *Quare Impedit præſentare ad Eccleſiam*: for that Damages are only recoverable in the *Quare Impedit*; and the Writ is not grounded upon the right of the Patronage; and yet although the Writ be general *præſentare ad Eccleſiam*; yet muſt the Count or Declaration be ſpecial according to her title.

33 H. 6. 12. & 36. acc. *Odingſals* caſe.

Cook 5. part, 102. in *Windſors* Caſe.

Note 33 H. 6. 12. & 36. by *Priſott*, a man cannot have a *Quare Impedit de Advocatione Medietatis*, or *de Medietate Advocationis*; For if two have an Advowſon in Common, or Joyntly, and one preſenteth, the other hath no remedy, becauſe that the preſentment is but a perſonal thing which is intire. And if

two

two Patrons make a Conſolidation, or an Union of two Churches, if one be diſturbed, he might have his *Quare Impedit ipſum Præſentare ad Eccleſiam*, and not *ad Advocationem Medietatis Eccleſiæ*, or *ad Medietatem Advocationis Eccleſiæ*.

If there be two Patrons of two Churches adjoyning, and the incumbent of one of the Patrons demandeth Tythes in the Spiritual Court againſt the incumbent of the other: and the one of the Patrons ſueth a Writ of *Indicavit* to ſtop his proceedings there, becauſe the right of the Patronage cometh in queſtion: In that caſe, the Patron of the Clark prohibited may have a Writ *de Recto de Advocatione Decimarum*, in this Form, *viz. Precipe A. quod reddat B. Advocationem Decimarum, Medietatis, Tertiæ, quartæ partis unius Carucat terre, &c.*

W. Cook 2 par. Inſtit. 364. 38. E. 3. 15. 38. E. 3. 19. Fitz. *Droit de Recto*. 8. acc.

Aſſize of Darrein preſentment, or *Aſſiſa ultimæ Præſentationis*, and *Quare Impedit*, are grounded upon the poſſeſſion; which the Patron upon an uſurpation had upon his own poſſeſſion, or his Anceſtors, or upon a ſpecial Diſturbance, may have and maintain,

Bracton. lib. 4. 246, 247. Fleta. lib. 5. cap. 12. Glanvile l. 6. cap. 17.

maintain; and thereby shall he recover the presentment, and remove the Incumbent who is in by wrong, and recover damages. But yet there is a difference betwixt the Writs of *Darrein* Presentment, and *Quare Impedit*. For 1. Where a man may have a writ of *Darrein* Presentment, there he may have a *Quare Impedit*, but not *è converso*. 2. A man may have a writ of *Quare Impedit*, without alledging of any presentment in a person certain; But a man cannot have an Assize of *Darrein* presentment; but therein he must alledge the presentment in some person certain. 3. A Lessee for years, Guardian, or Tenant at will may have a *Quare Impedit*, but they cannot have or maintain a *Darrein* presentment, because that no person can maintain an Assize, but he that hath a Freehold. 4. If the Husband be seized of an Advowson in the wives right, and a stranger doth usurp, the Husband may have a *Quare Impedit* in his own Name, without the naming the wife in the writ, for that the disturbance is personal, which falls in dammage to the Husband: But he

20 E. 3. Darr. Presen. 13. Old Na. Br. 25.

5 H. 7. 14. by Farrfax.

30 E. 14. by Hobert.

16 H. 7. 6.

21 E. 4. 2.

cannot have an Asize of *Darrein* presentment wherein the Advowson is to be recovered, but the Wife must be joyned, and named in the Writ.

14. H. 4. 12.
50. E. 3. 14.

In Asize of *Darrein* presentment the Writ doth suppose that the Defendant doth deforce him of the Advowson, and yet in the Count or Declaration he Counts that he or his Ancestors did last present; and the Count although it seemeth repugnant to the Writ, yet it is not so, but is good, and the Count shall not for the seeming variance abate the Writ, because there is no other form of Writ.

34. H. 6. 38.
43. Ass. 21.
13. E. 3. protection 52.
40. E. 3. 1.
11. H. 6. 3.
15. E. 3. Conusans 41.
9. H. 7. 15.
5. H. 7. 16.
Br. Aid. 120.

In these Writs of *Darrein* presentment, and *Quare Impedit*, A protection doth not lye for the Defendant, because of the danger of the Lapse: Neither shall *Conusans* of Pleas be granted in a *Quare Impedit*, because the inferiour Court cannot write to the Bishop to admit the Clark: neither shall a man have aid in a *Quare Impedit* for the danger of Lapse.

Every *Quare Impedit* must be brought against the Patron, the Ordinary,

dinary, and the Incumbent; For if it be brought againſt the Ordinary and Incumbent only without naming the Patron in the Writ, the Writ ſhall abate; But yet it ſtands upon this difference, *viz.* If the Inheritance of the Patron in the Patronage is to be deveſted by the Judgement to be given in the *Quare Impedit*, then the Patron ought to be named in the Writ; But when the inheritance is not to be diveſted by the Judgment, but the preſentment only to be recovered, there it is not neceſſary that the Patron be alwayes named in the Writ.

Cook 7. part 26. in *Halls* caſe.

7 H. 4. 25. 3 H. 4 3. 13 H. 8. 13. 47 E. 3. 11.

If A. hath the Nomination to a Church, and a Biſhop the preſentation, and the Temporalties of the Biſhop come to the King, and afterwards the King doth preſent without the Nomination of A. and his Clerk is inducted, There the *Quare Impedit* muſt be brought againſt the Biſhop and incumbent only, for that the King cannot be a Diſturber, and the Writ will not lye againſt him, for that he can do no wrong. But it ſeemeth, the Biſhop muſt be named in the Writ, for that the incumbent

38 H. 8. Dyer 48.

4 E 6. pett. Br. 410.

could not come into the Poſſeſſion of the Church, but by the Admiſſion of the Biſhop, and the Biſhop may be a ſpecial Diſturber: And as it is good policy upon every preſentation had by uſurpation, or other Diſturbance, to bring a *Quare Impedit* as ſpeedy as may be: ſo likewiſe it is good policy to name the Biſhop in the writ, as it was holden by the Juſtices in the Court of *Common Pleas*, Mic. 3. Jac. in *Lancaſter* and *Lows* caſe: for then he ſhall not Collate for Lapſe, if the Church void during the ſix moneths: Neither ſhall the Metropolitan, if the time be come unto him, Collate for the ſame Lapſe; For it is a Rule in Law, That the Metropolitan ſhall never Collate for Lapſe, but when the immediate Ordinary might have Collated for Lapſe, and hath ſurceaſed his time: And in this caſe, the Ordinary cannot Collate, becauſe he is made a party to the writ which is brought.

Cook 1. part, Inſtit. 344.

9 H. 6. 30, 31. 19 H. 6. 68.

5 H 7. 34.

The Writ of *Quare Impedit* is a Mixt Action, for Summons and Severance lyeth therein; and although the preſentment may *incluſive* be recovered

recovered thereby; yet damages are the principle which is reſpected in it; and therefore if the Husband and wife be ſeized of an Advowſon in the right of the wife: if the Church be void, and the Husband be diſturbed in his preſentment to the Avoydance, he may have a *Quare Impedit* in his own name, without naming the Wife in the Writ; for although the preſentment be recovered thereby, yet for the diſturbance which is a perſonal wrong, damages are to be recovered, which ſhall go to the Husband; and therefore a releaſe of all Actions perſonal, is a good barr in a *Quare Impedit* brought by him.

50. E. 3. 13. 28. H. 6. 9. acc.

22 H. 6. 27. b. 9 H. 9. 57. acc.

If the Plaintiff be Non ſuit in his *Quare Impedit* after the appearance, the ſame is a good barr in another *Quare Impedit* brought within the ſix moneths; and the Defendant upon Title made, ſhall have a Writ to the Biſhop; and ſo it is if the Plaintiff doth diſcontinue his Suit: or if he be made a Knight pendant the Writ, the ſame ſhall abate the Writ, becauſe it is his own Act: But if the writ doth abate for inſufficien-

22 H. 6. 1. 22 H. 6. 46. 38 H. 6. 14. 24 E. 3. 25. b.

Cook 7 part, S. Hugh Portemans caſe.

cy of form, or for falſe Latine, or miſnaming of the Plaintiff or Defendant in it, there the Defendant ſhall not have a Writ to the Biſhop, but the Plaintiff ſhall have a new Writ by *Journeys Accompts.*

26 E. 3. Qu. Imp. 163. Cook 6. part, *Spencers* caſe.

If two Tenants in Common, or Coparceners be of an Advowſon, and a ſtranger doth uſurp, ſo as their Right is turned into action, and they bring a *Quare Impedit*, and ſix moneths paſs, and then one of the Plaintiffs dyeth, the Writ ſhall not abate, but the Survivor ſhall recover; otherwiſe there would be no remedy to redreſs this wrongful uſurpation; but they muſt joyn in the firſt Writ; for if the Writ be brought by one of them, the Writ ſhall abate. But if a *Quare Impedit* be brought againſt the Patron and the Incumbent, and pendant the Writ, the Patron dyeth, there the Writ ſhall abate, as it is ſaid in *Cook* 7. part, in *Halls* Caſe. But *quere* of that Caſe. For that it ſeemeth contrary to the Caſe in 3 Eliz. Dyer 194. where the Caſe was, That the Biſhop of *Coventry* and *Lichfield*, Patron of two Prebends, granted the next

14 H. 4. 12. 10 Eliz. Dyer 279. 37 H. 6. 7. 17 E. 3. brc. 665.

Cook 1 part, Inſtit. 198. 3 H. 5. br. Qu. Imp. 71.

3 Eliz. Dyer 194.

next Avoydance *alterius coram primo vacant.* Which was confirmed by the Dean and Chapter; the Bishop dyed, and one of the Prebends voided, and the Successor of the Bishop presented, and afterwards the Grantee brought a *Quare Impedit* within the six moneths, and two years after the Issue was found for the Plaintiff, and the Bishop dyed, and yet the Plaintiff had his Judgement, and had a Writ to the Bishop to remove the Incumbent who was presented by the Successor of the first Bishop.

CHAP. XXVI.

Of the Profits of the Rectory, viz. *Oblations*, *Obventions*, *Offerings and Tythes. And where Suit for Tythes shall be in the Spiritual Court; Where in the Temporal Court.*

THE Profits and Fruits of the Parsonage or Rectory belonging to the Parson or Vicar besides the Gleab Lands, of which we have before spoken, doth chiefly consist in Oblations, Obventions, Offerings and Tythes. Of Oblations, Obventions and Offerings being meer Spiritual things, and not much touched upon in the Books of our Law, I will forbear to speak at this time; and say somewhat of the Last of them, *viz.* Tythes; of which there is much said in the Books of the Common Law.

Cook 11. part, 13. in *Pridle & Nanbers* case. 7 E. 6. Dyer 84. 31 El. in C. B. *Perkins* and *Hinds* case adjudg. acc.

Tythes are an Ecclesiastical Inheritance, Collateral to the estate of the Lands, *viz.* to take the tenth part of the profits of the Lands, and recoverable onely in the Ecclesiasti-

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cal Court, They are not extinguiſhed by a Feoffment made of the Lands; by the demiſe of the Lands, with all Profits and Commodities belonging to the ſame they will not paſs; They are not iſſuing out of Land as Rent is, Nor can they be extinct by Unity of poſſeſſion, unleſs it be a perpetual Unity, as hereafter ſhall be ſhewed, all which prove them to be Collateral to the Land.

In Antient time before the Council of *Lateran*, every man might have given his Tythes to what Church he pleaſed, and have beſtowed them upon what Parſon he thought beſt; Or the Biſhop of every Dioceſs might have made a Diſtribution of them, within his own Dioceſs; But by a Canon made in the ſaid Council, every man is ſince compellable to pay or give his Tythes to the Parſon, or Vicar of that Pariſh where they are growing or ariſeing; Now although before the ſaid Council the parties might have granted them at their own Liberties; Or that they might have been diſtributed as aboveſaid: and by the ſaid Canon,

Canon they are now restrained to give or pay them to the Parson or Vicar of that Parish where the Tythes arise, yet did not that Canon make them to be more Ecclesiastical then they were before; But the Jurisdiction of Tythes as well before the said Canon, as ever since did *de jure* belong to the Ecclesiastical Court; For neither Affize or *Precipe* did lye of Tythes, or any other Ecclesiastical duty at the Common Law; and therefore although we find in some Books and Records of our Law, That Suits have been prosecuted in Courts of Lords of Mannors, and in the Kings Temporal Courts, as in particular, Cook 2. part, Instit. 661. A *Scire facias* at Common Law lay of Tythes. Register 165. A Writ of Covenant brought to levy a Fine *de Decimis Garbarum*, wherewith agreeth 38. H. 6. 20. 7. E. 3. 5. by *Parning*: and a Writ of Right of Advowson, *de Advocatione Decimarum Ecclesiæ*, as is said in 4. E. 3. 27. by *Shard* and *Stoner*, with which agree the Books 8. E. 3. 49. 12. E. 4. 13. 31. H. 8. br. Prohibition 17. Yet the said Suits

Suits were not for them as Tythes meerly, but as Lay-profits apprender, and not as Eccleſiaſtical duties; and therefore where it appeareth in the Book of 44. E. 3. 5. that an Aſſiſe was brought of Tythes, it is to be obſerved in the Book, that the Aſſiſe there brought, was of the tenth of all manner of Corn and Grain growing in 100. Acres of Lands, after the Tythes of the Parſon were taken, which was but a Lay-Profit Apprender, and no Eccleſiaſtical Duty. 44. E. 3. 5.

If Tythes dolye in any Forreſt as in the Forreſt of *Winſor*, *Rokingham*, *Sherwood*, or other Forreſt which is out of any Pariſh, the King ſhall have them by his Prerogative: and not the Biſhop of the Dioceſs, or the Metropolitan of the Province, as ſome have thought: But yet it ſeemeth by the Book of 22. Aſſ. 75. That if there be cauſe of Suit for ſuch Tythes againſt the Parties who ought to pay the ſame, the Suit muſt commence, and be brought in the Eccleſiaſtical Court: But if a ſtranger taketh away ſuch Tythes, then for ſuch Treſpaſs, Suit may be in the 14. H. 4. 17. 22. Aſſ. 75. *Diſmes* 10.

the Temporal Court, as the same may be for the taking away of other goods in the like case; And in some case, actions will lye of Tythes at the Common Law, as it was adjudged Trin. Car. 15. in the Kings Bench, that an *Ejectione firme* will lye of Tythes.

16 E. 3. Qu. Imp. 147 *V.* 30 E. 1. in acc. 38 E. 3. 13. by *Finchden.* Cook 11. part, Dr. *Graunts* case.

In 16. *E.* 3. Qu. Imp. 147. the King brought a *Precipe quod reddat* of the fourth part of the Tythes and Offerings of the Church of St. *Dunstans* in the West, against a Prior, and it was Ruled that the Writ did lye; but it is to be noted, that the Writ was not brought (as I conceive) against the Prior as a Parishoner who ought to pay the Tythes, but against him as Prior, for taking away the Tythes against Right; so as the Suit was not originally for the Tythes as Tythes, but the wrongful taking and carrying them away. For Tythes set forth are become Lay Chattels, for which the King had his Remedy at the Common Law, if they were taken from him, and by the Common Law, the King was capable of Tythes.

38 E. 3. 20.

In 38 E. 3. 20. A Prior Alien Farmer of the King, was indebted to the

the King for his Farm, and being ſued for the ſame in the Court of Exchequer, he ſhewed unto the Court, that there was a Parſon who held a portion of Tythes which was parcell of the poſſeſsions belonging to his Farm; and that the Parſon withheld the Tythes from him, ſo as by reaſon thereof he could not pay the King his Farm Rent without having of thoſe Tythes which were in the Parſons hands: and upon this a *Quo Minus* iſſued out of the Court of Exchequer, at the Suit of the King and of the Prior againſt the Parſon, for the paying of thoſe Tythes to the King, and there it was ſaid by *Shipwith*, That of that which concerneth the King, and may turn to his advantage, and may haſten his buſineſs, whether the thing be Spiritual or Temporal, the Court of Exchequer ſhall have the Juriſdiction. But note, That that was by the Kings Preroga ive, for that it was agreed, That Suit for Tythes doth not fall into the Juriſdiction of the Kings Bench, or Common Pleas, for that the Right of Tythes is determinable only in the Eccleſiaſtical Court.

All

All Tythes then being originally Sueable for, and recoverable in the Ecclesiastical Court, let us see how far the Statute of 32. H. 8. cap. 7. hath altered the Law in this point.

After the Statute of 27. & 31. H. 8. of Dissolutions of Abbies and Monasteries: (by which Acts of Parliament, many Advowsons, Parsonages, Vicariges, Pensions, Portions and Tythes came unto the Crown, and were afterwards by Conveyance, or otherwise transferred, and granted over unto Lay persons who were not capable of Tythes by the Common Law) The Statute of 32. H. 8. cap. 7. was made: By which Statute it is enacted, *viz.* That if any person which should have any estate of Inheritance, or Freehold, Term, Right, or Interest in any Parsonage, Vicarige, Portion, Pension, Tythes, or other Ecclesiastical or Spiritual duty or profits, then made Temporal, or which should be suffered to go into Lay mens hands, should be disseized, wronged, or kept out of their Lawfull Inheritance, Rights or Interests to the same; that the persons so

Disseized,

Disseised, or wrongfully kept out of their rights or possessions, their heirs, *&c.* should have recovery in the Kings temporal Courts for the recovery of their rights or possessions by Writs of *Precipe quod reddat*, Assize of Novel Disseisin, Writs of Dower, or other Writs as the Case shall require.

This Statute for these Tythes, Oblations, and other Spiritual profits made Lay fees in temporal mens hands as aforesaid, gave remedy in the Kings temporal Courts; Yet did not this Statute take away the force of the Ecclesiastical Law concerning Tythes: But for not setting forth of Tythes, or for refusing to pay the same, all Ecclesiastical persons who had right before the said Statute to have Tythes, or Oblations, *&c.* might demand and sue for the same in the Ecclesiastical Court: So as this Statute was an addition unto the Law in respect of the Lay fees, and no alteration or Diminution of that power that the Ecclesiastical person had for his Tythes in the Spiritual Court before the Statute; And upon this Law (as I conceive) was the Case of 7. Ed. 6. in Dyer 83. grounded; where

where an Assise was brought *de libero tenemento de quadam portione decimarum.* And the Case of Pasc. 5. Jacobi. the Countess of *Oxfords* Case, where a Writ of Dower was brought of predial tythes: for that I have not found, or read in any book of the Common Law, That a woman was dowable of tythes, or that any Assise or Precipe did lye of them as Ecclesiastical duties; for that it is said, in Cook 11. part 13. in *Pridle* and *Nappers* Case, That a Lay-man could not have an inheritance in tythes at the Common Law; nor did they pass betwixt party and party as other temporal inheritances did: But now, (as I said before) tythes and other Ecclesiastical duties that came to the Crown by the Statutes of 27. and 31. H. 8. of Dissolution, are by these Statutes in the hands of Lay-men temporal inheritances, and shall be accounted Assets, and the husband shall be tenant by the Curtesie, and wives shall be endowed of them, and have other incidents belonging to temporal inheritances: This only Ecclesiastical quality and priviledge they still have and retain, that

that the owner or proprietor thereof may sue for the same for the substraction of them if he please.

In the nineteenth year of the reign of Queen Eliz. in the Kings Bench, it was disputed, whether Tythes were due *de jure divino*, or by the constitution only of men; and it seemed to the then Judges, That they were as well due by the constitution of Kings, as by the Law of God. This agreeth well with the discourse of the Student in the Book called Doctor and Student, fo. 166. If it was disputed *de quota parte*, for the Student there holdeth, That the tenth part was due only by mans Law; and for to confirm his opinion, he voucheth *Gerson* the Divine, in his Treatise intituled, *Regulæ morales*, where he saith, *Solutio Decimarum Sacerdotibus est de jure divino, quatenus inde sustententur; sed quoad tam hanc quam illam partem assignare, aut in alios redditus commutare positivi juris est.* And in another place where he saith, *Non vocatur portio Curatis debita propterea Decima, eo quod sit semper decima pars; imo est interdum vicesima, aut tricesima:* but that Tythes were due *ex jure*

divino, there was never any queſtion, or doubt; but *de quota parte*, there hath been ſome queſtion. And although we find in Mr. *Fitzherberts Natura Brevium* 30. that before the Statute of 18 E. 3. right of Tythes was ſometimes decided in Temporal Courts, concerning which I have before delivered my conceit, yet did not that make them not to be Spiritual, as before is ſaid; for we ſee that the Probate of Wills and Teſtaments did belong unto Lords of Mannors in their Courts, and did appertain to the Spiritual Courts but of later times, as is ſaid in *Cook* 9. part, in *Henſloes* Caſe, wherewith agreeth *Linwood*, Lib. 5. de Teſtament; and 11 H. 7. 12. and belonged unto Ordinaries, *ex conſuetudine Angliæ, & non de communi jure*, as is there alſo ſaid. Yet it is not to be thought or doubted, but that Wills and Teſtaments, and Legacies therein contained, were eſteemed Eccleſiaſtical, and to appertain to Eccleſiaſtical Juriſdiction. But Tythes (as I conceive) in themſelves (*quatenus* tythes) were ever Spiritual and due *ex jure divino*, and were not accounted as Temporal inheritance; for they could

could not be appendants unto Manors or Lands; nor were they ſuch things out of which rents and ſervices could be reſerved, nor were they transferrable as other temporal inheritances were; and yet they might have been given in exchange for other temporal inheritances; for in exchanges it is not requiſite that the things exchanged be of one nature or quality, and therefore the exchange of tythes for annuity or rent was good in 9 E. 4. 21. in the Prior of *Sempringhams* Caſe; but there it is to be noted, That the ſame was betwixt Religious and Eccleſiaſtical perſons, and not betwixt them and Lay-men; for before the Statute of 32 H. 8. cap. 7. Lay-men were no way capable of Tythes in pernacy, as before is ſaid.

9 E. 4. 21. the Prior of *Sempringhams* caſe.

If a Parſon maketh a leaſe for years of his Parſonage and Gleab Lands, rendring a Rent for all manner of demands as well Spiritual as Temporal, yet the Leſſee ſhall pay the Tythe hereof to the Parſon for that Land, as it was holden, Paſc. 32 Eliz. in Parſon *Babbingtons* Caſe, for that Tythes are due *ex jure divino*, and they cannot be included in the rent; But *quere* of

32 Eli. Parſon *Babbingtons* Caſe.

30 H 8. Dyer 43. 42 E 3. 13. by Kitton.

that Case, for that it hath been lately holden and adjudged, Trin. 38 Eliz. in *Blinco* and Parson of *Marstons* Case, which see in Cro. 3. part, 479. that of the Gleab Lands the leasee shall not pay Tythes, because it is parcel of the Church Lands, and *Ecclesiæ Decimas solvere non debet.*

Tr. 38 Eliz. B. R. *Blinco's* Case, Cro. 3. part, 479.

If Tythes be severed and set forth, and afterwards the Parson leaseth out his Parsonage, without mentioning of the Tythes, the Tythes set forth shall pass; and so it was adjudged, Mich. 6 Jacobi in the Common Pleas in *Smiths* Case; for although they be divided and severed, yet they are (as yet) Spiritual duties of the Parsonage; but if the Tythes be carried into the Barn, and afterwards the Parson leaseth out his Parsonage with all profits, commodities, &c. those Tythes shall not pass to the leasee, for that by so doing they are now become his Lay Chattels.

Mic. 6 Jac. Co. B. *Smiths* Case.

If a Parson doth demise his Rectory for years, the Tythes will pass *inclusive*, although the Lease be by word only: But if a Parson leaseth out his Tythes a'one, they will not pass unless the lease be by Deed or Writing, as

19 H. 8. 12. 21 H. 7. 21. 9 E. 4. 47, 48. acc.

was

was adjudged, Tr. 26 Eli. in the Kings Bench in *Withy* and *Sanders* Case. But that stands also upon a difference; for the Parson may demise his Tythes to the owner of the Land for one year by word only, as it was agreed by all the Judges in B.R. Mic. 2 Car. Rot. 179. in *Bellamy* and *Babthorps* Case; but he cannot demise them to a stranger, but it must be by Deed; and although Tythes will pass to the owner of the soil by contract only, as before is said; yet may the Parson notwithstanding such contract sue the owner of the soil for the Tythes in kinde in the Spiritual Court, and the owner by reason of such a contract shall not have a prohibition to stay his Suit there, as was holden Mic. 8 Jacobi in Co. B. in *Crosts* Case; but the owner may sue the Parson upon the contract in the Temporal Court, and recover as much in damages; but then in his pleading he must not declare of a verbal contract, but must set forth the same to have been made in writing; and so it was holden, Pasch. 7 Jacobi in Co. B. in *Pawlins* Case.

Tr. 26 Eliz. B.R. *Withy* and *Sanders* Case.

Mich. 2 Car. B.R. *Bellamy* and *Babthorps* Case.

Mich. 8 Jac. C. B. *Crosts* Case.

Pasch. 7 Jac. C. B. *Pawlings* Case.

CHAP. XXVII.

What Persons were capable of Tythes at the Common Law; Of what things Tythes shall be paid. What shall be a good Modus Decimandi *for Tythes, and how far it binds the Incumbent and his Successor. And of divers other things concerning the payment of Tythes.*

BY this that hath been said, it appeareth, that by the Common Law, a meer Lay-man was not capable of Tythes, nor could any man sue for the same in the Ecclesiastical Court, except he were a Spiritual or Ecclesiastical person. And to that purpose, see 11 Ass. 9. where it is said, That no man shall sue for Tythes but the Parson; and if he joyneth another in the Suit with him, his Suit shall abate.

11 Ass. 9.

2 R. 2. Jurisdiction 37.

In 2 R. 2. Jurisdiction 37. In an Action of Trespass, the Defendant justified for Tythes in the right of his Master, and pleaded to the Jurisdiction of the Court, and he was forced to answer

anſwer the Action there, for that the Plaintiff could not have his remedy in the Spiritual Court againſt the defendant for the ſaid Tythes, nor could the Defendant ſue the Plaintiff in the Spiritual Court for the ſame, but a prohibition would lye, for that he was not a perſon able to ſue for Tythes there, being a Lay-man; and the right of the Tythes was not tryable in the Spiritual Court, but betwixt Spiritual perſons: ſo in an action of Treſpaſs brought by a Vicar for taking of his goods, the Defendant pleaded, That J. S. was Parſon of the ſame Church, and that the goods were Tythes ſevered, and that he as the Parſons ſervant took them; the plaintiff replyed, That he was Vicar of the ſame Church, and that he and his predeceſſors Vicars, had uſed to have the Tythes as belonging to the Vicarige, and traverſed that they were the goods of the Parſon; the Defendant demanded the Juriſdiction, becauſe that otherwiſe the right of the Tythes would in that Action be tryed betwixt them; It was the Opinion of the whole Court, That as this Caſe was, the Court ſhould not be ouſted

39 E. 3. 24. a.

6 E. 4. 3.

of the Jurisdiction, because the Plaintiff could not have his Action against the Defendant in the Spiritual Court, nor the Defendant there against him, because they were not both Spiritual persons betwixt whom the right of the Tythes could be tryed in the Spiritual Courts; but in all actions, if it appeareth by the plea in bar of the defendant, or by the plaintiffs Replication, That the right of the Tythes doth come in debate, if the persons be of ability to sue there, the Temporal Court shall be ousted of the Jurisdiction; by which Cases it appeareth, That by the Common Law no person was capable of Tythes but a Spiritual person, nor could any sue for the same in the Ecclesiastical Court, except he was an Ecclesiastical person betwixt whom the right of Tythes was only tryable; but yet at the Common Law, the King being *persona mixta cum sacerdote*, as it is said in 10 H. 7. was capable of Tythes, and his Patentee by his prerogative, as appeareth by the Case of 22 Ass. 75. before cited; where the King having Tythes in the Forrest of *Rockingham*, did by his Letters Patents grant

38 H. 6. by *Fortescue.*
35 H. 6. 39.
14 H. 4. 17. a.

grant the same unto the Provost of C. who thereupon brought a *Scire facias* against the Occupiers of the lands within the Forrest to have execution of those tythes, and the Writ was allowed, although the execution was afterwards stayed for some other cause; and the cause perhaps might be for that the said Provost was not an Ecclesiastical person (for there were many Lay Provosts) *ideo quære* that Case and the Record thereof.

Now although a meer Lay-man, Monks who as *Bede* saith were *mere laici*, were not capable of tythes by the Common Law in pernancy, and as to sue for the same in the Ecclesiastical Court; yet by the Common Law a meer Lay-man was capable of a discharge of tythes; and that two wayes: first, by grant of the Parson, and secondly, by composition; for although a meer Lay-man could not, nor can at this day prescribe in *non decimando*, as it is said in Cook 2. part in the Bishop of *Winchesters* Case, and in 8 E. 4. 14. by *Choke*, yet may he prescribe in *modo decimandi* to pay a composition to the Parson in lieu of all

all his tythes; and such composition shall binde the Parson; and although they in the Spiritual Court will not allow of any plea in discharge of tythes in their Courts, as it is said in Doctor and Student 177. and in 8 E. 4. 14. by all the Serjants; yet upon a surmise and supposition of a *Modus decimandi* in the Kings temporal Courts, a prohibition shal be awarded unto the spiritual Court to stay their proceedings, untill the *Modus decimandi* be tryed in the Kings temporal Court.

Mic. 33. Eliz. in the Kings B. in a prohibition sued by the Bishop of *Lincoln* against *Cooper*, who sued him in the spiritual Court for tythes, the Bishop suggested, that he and his Predecessors were seised of the Mannor of D. and that as long as it was in their possessions, had been discharged of tythes; and that the Mannor in the time of E. 6. was conveyed to the Duke of *Somerset* in fee, and afterwards was regranted to the Bishop and his successors: In this Case it was objected, that the prescription was not good *de non decimando*; and if it was good, yet it was interrupted by

by the seisin of the Duke, and although that the Mannor was reassured, yet that the prescription was not revived; But it was resolved by all the Justices, that the prescription was good in the Case of a spiritual person, but not in the Case of a common person; and that in this Case the prescription was not gone by the interruption, for that tythes are not issuing out of lands, neither can unity of possession extinguish them, nor were they extinguished by a release of all right in the land.

V. Cook 11. part, *Pridle* & *Nappers* case. acc.

In 38. E. 3. grants 84. A Prior imperſonee did grant unto I. S. that he should not pay tythe of corn or grain growing upon such lands, and the grant was holden good, and did binde the Prior: so in 38 E. 3. jurisdiction 44. the Prior of R. brought an action against the Abbot of S. and his cofreers for taking of his corn; the defendants pleaded, that the Prior was Parson of the Town where the corn grew, and that their lands were not tytheable, by reason of a composition made betwixt them and the Prior for the tythes of their lands; and in that Case it was adjudged

38 E. 3. grants 84.

38 E. 3. Jurisdiction 44.

judged, That if the Action be brought for the tythe of the Land, that the composition pleaded will be a good bar to the action. And it appeareth by the Register, fol. 38. that a man may be discharged from the payment of Tythes by composition made with the Parson or Vicar, and it is usual, as by many Cases herein after it shall appear.

Now although it be agreed, That a meer Lay-man cannot prescribe *in non decimando*, not to pay any Tythes at all, for that such a prescription would be against the Law of God, Tythes being due *ex jure divino*: yet the opinion of the Student in his discourse of Tythes, Doctor and Student 167. is, That a County may prescribe to be quit of the Tythe of Corn and Grass, so as the Vicar or Curates have sufficient portions besides to live upon; but if one man of a Town would prescribe to be discharged of Tythe of Corn and Grass, such a prescription would be utterly void, unless he did shew, that he did recompence the Parson or Vicar some other way; but one man in a Town may prescribe to pay a certain pension to the Parson or Vicar

Vicar yearly in lieu and contentation of all his Tythes; and ſuch a preſcription hath been adjudged good, Mich. 40 Eliz. in *Pigot* and *Hearns* Caſe; and *vide* Mich. 15 *Car.* in B.R. where it was adjudged, that a hundred might preſcribe in not payment of Tythes, upon the reaſons aforeſaid; but a Pariſh or a particular Town cannot preſcribe in *non decimando.*

A Spiritual perſon may preſcribe not only in *modo decimandi*, but alſo in *non decimando*, not to pay any Tythes at all; and lands may be diſcharged of Tythes in the hands of Spiritual perſons, and now ſince the Statute of 31 H.8. in the hands of the Kings Patentees, by ſuſpention, priviledge or unity.

The Biſhop of *Wincheſter* preſcribed, That he and all his predeceſſors there, Farmers and Tenants had holden a Mannor, and the demeaſnes and the Lands thereof exonerated, acquitted and diſcharged of and from the payment of Tythes; and the preſcription was adjudged good, and that it was good as well for his Tenants and Farmers as for himſelf.

If a Parſon purchaſeth a Mannor or 30 H.8. Dyer 43.

or land in a Parish whereof he is the Parson, the tythes of this Mannor and lands are suspended whilst the Mannor, and Lands, and Parsonage remain in his own hands or occupation, because he cannot pay tythes to himself; but if afterwards he maketh a feoffment in fee of the said Mannor or Lands, or leaseth them out for years unto another, there the purchaser or leasee shall pay tythes to the Parson, & he shall have tythes of the Lands against his own feoffment or leasee, for that tythes being due *ex jure divino*, must be paid unto whose hands soever the Mannor or Lands come, unless they come to the Parson himself, or unless the Parson to whom the same do come, can plead to be discharged from the payment of tythes for the said Mannor or Lands by some special priviledge.

An Abbot and his Covent, or a Prior and his Covent, might have been discharged from the payment of tythes; but if all the Monks had dyed, and the Abbot and Prior also, so as there had been a dissolution in Law of the Abby, or Priory, if the Lands

Lands had come to other persons, the occupiers or owners of the Lands should have paid tythes, as it was adjudged Mic. 11. Jacobi in the Court of Common Pleas, in the Dean and Chapter of *Winsors* Case.

The Cistertians, Templers, and Hospitilers by their Order were to defend the Christians against the Infidels, and had a priviledge granted unto them by Pope *Adrian* in the Council of *Lateran* (which priviledge was restrained only to those three Orders; and of which Orders our Laws only took notice of) *ut decimas prædiorum suorum quæ in manibus suis propriis excolunt non tenentur solvere*, which must be so averred, as it appeareth by Cook in his new Book of Entries, f. 542. This was but a special priviledge for the Lands in their own Manurance, for the maintenance of Hospitality, and had many restrictions: as first, It extended only to such lands as they had at the time of the said Council, and for so long time only as the same remained in their own possessions: but if lands had been purchased by them after the said Council, the immunity for such lands did

V. 15. Eliz. in *Harpers* Repo.

did not extend to them, as it was said, Pasch. 16 Jacobi in C. B. in *Potter* and *Batherſts* Case; and so it was if lands had escheated unto them after the said Council; the priviledge did not extend to such lands; for it was but a special priviledge, and was therefore to be taken strictly, as it was adjudged in *Hodysons* Case, 8 Car. which Case see in *Claytons* Reports, 181.

The Abby of Fountains was of the Order of the Cistertians, and 11. *Johannis* before the Council gave Lands to one *Kerby* to hold of them by fealty, *&c.* and afterwards in 36 E. 3. those Lands did escheat unto the Abby: It was resolved in this Case in the Court of the Common Pleas in Sir *Thomas Dickensons* Case, that for those Lands so escheated Tythes should be paid, like unto the Case of 29 E. 3. *Quinzim* 1. where Lands are holden of an Abby discharged of the payment of *Quinzim*, and afterwards the same Lands come to the Abby, the Abby shall pay *Quinzim* for those Lands.

See Hill. 1 Car. in an Attachment upon a prohibition between *Dickenson* and

and *Greenhow*, which Caſe ſee in *Popham's* Reports 156. Thoſe who were of the Order of the *Præmonſtratenſes*, claimed the priviledge to be diſcharged of Tythes, which they ſaid was granted unto them by the Pope, but was never confirmed by any Act of Parliament in this Realm; it was for part of the poſſeſſions of the Abby of *Cockerman* in *Lancaſhire*, which afterwards was ſurrendred and came to King *Hen.* 8. It was a Queſtion, If this grant of Priviledge was good or not? It was much doubted of, and not reſolved by the Juſtices; for it was ſaid, That it appeareth by the Book of 11 H. 4. That the Pope could not by his Bulls, Councils, or Decrees alter the Laws of the Realm; It was much inſiſted upon for the allowing of this priviledge unto them for that, that this Bull of the Pope granted unto them was confirmed unto them, 24 of King *John*: and that it appeareth in a Record 22 E. 1. Rot. Membrana 5. That the King took them and their Immunities into protection; and that in 22 R. 2. *John* of *Gaunt* having *jura Regalia* in the County of *Lancaſter* confirmed

this Bull unto them likewiſe, and for theſe reaſons it was ſtrongly urged, That thoſe of the ſaid Order of *Præmonſtratenſes*, were at the time of the ſaid Statute of Diſſolution *de facto* diſcharged of Tythes, though it was not *de jure* a good diſcharge within the ſaid Statute of 31 H. 8. Quere, for the Caſe was not reſolved by the Juſtices.

And that the Lands which the houſes of thoſe religious Orders before mentioned purchaſed after the ſaid Council of *Lateran*, or which afterwards eſcheated unto them, were not priviledged, appeareth by the Statute of 2 H. 4. cap. 4. whereby it is enacted, That the Religious houſes of the Order of the Ciſtertians, which had purchaſed Bulls to be diſcharged of tythes, ſhould be in ſtate they were before, and that againſt thoſe that took advantage of them proceſs of *Præmunire* ſhould be awarded: by which Statute it appeareth, that they intended to have diſcharged the lands of Tythes which came to them after the ſaid Council, but that the Lawes of the Land would not allow of ſuch Bulls for diſcharge, or extend the priviledge

viledge unto other Lands then what they had in their own Manurance at the time of the said Council. 2. The priviledge was but special for the Lands in their own Manurance; for if they had leased out those Lands to Farmers for rent, if it had been but for years or at will, yet the Farmers or occupiers of those Lands should have paid tythes; for by the leases the leasors had admitted the occupation of the Lands to be in the leasees; for upon such possessions they might have maintained actions of Trespass; and so was it adjudged 10 Jacobi in the Common Pleas in *Jaggard* and *Huttons* Case. 3. The priviledge was but special, and did not extend unto new erections upon lands which were priviledged. And whereas by the Law, and the ancient constitutions of the Church, of ancient Mills Tythes were not paid: but by the Statute of *Articuli Cleri*, cap. 5. for Mills newly erected Tythes shall be paid; it was adjudged Trinit. 14. Jacobi in the Kings Bench in a Case of Prohibition, That where a Parson did Libel in the Spiritual Court for the Tythes of a Mill which was erect-

V. 18 Eliz. Dyer 349. Cook 2. part. 44.

3 H. 8. Kellaway 163.

ed upon Lands discharged from the payment of Tythes by force of priviledge within the Statute of 31 H. 8. that a prohibition would not lye in the Case, for that *de molendino novo erecto* Tythes should be paid.

Unity of possession of the Parsonage and Lands which should pay Tythes by Appropriation or otherwise in the hands of Religious and Ecclesiastical persons had discharged them from the payment of Tythes; and now at this day by the Statute of 31 H. 8. cap. 13. such an unity of possession in the hands of the persons of such religious houses, shall be a discharge for the Kings Patentee from the payment of Tythes for the lands that came to the Crown by the said Statute: but then such an unity in the said Religious and Ecclesiastical persons, must have been *justa, æqualis, libera, perpetua*, as it is said in Cook 11. part, in *Pridle* and *Nappers* Case. For if either the Parsonages, or the Vicariges Lands or Tythes, had come, or had been united unto their houses by disseisins, or other tortious and unlawful acts, such an unity had not

not been a good diſcharge within the ſaid Statute. 2. It muſt have been *æqualis*, there muſt have been a Fee-ſimple both in the Lands and in the Tythes, or Parſonage, *ſimul & ſemel* in them; for if the Abbots, Priors, or other Religious perſons had held but by Leaſe, that had not been ſuch an union as the Statute intended. 3. It muſt have been *libera*, free from the payment of Tythes; for if their Farmers, Tenants at will, or years, had paid Tythes, that had not been a ſufficient unity to have diſcharged them from the payment of Tythes. And laſtly, It muſt have been *perpetua*, time out of mind; and then for the infinite impoſſibility and impoſſible infiniteneſs, that ſuch immunities and diſcharges that ſuch Religious perſons and houſes had before time of memory, could not be known; ſuch an unity had been a good diſcharge in their own hands, and at this day ſuch an unity is a good diſcharge for the Kings Patentees, within the Statute of 31 H. 8.

In 17 Eliz. in the Kings Bench, the Caſe was; An Abbot held a Parſonage Impropriate which was

discharged of Tythes, and he purchased parcel of the lands, so as the tythes thereof were suspended in the hands of the Abbot; afterwards the possessions of the said Abby came to the King by the Statute of 31 H. 8. of Dissolutions: the question was, whether the Lands so purchased by the Abbot before his surrender of them to the King upon the Statute, were discharged of Tythes: in this Case it was the Opinion of Mr. *Plowden*, That they were not discharged: For he said, That no Lands were discharged, but such as were lawfully discharged by right composition, or other lawful thing; and in the said Case the Lands were not discharged in right, but suspended only during the time that they were in the Abbots hands. *Quere*, for the Case was not resolved.

Mich. 33 Eliz. in the Kings Bench, *Nash* and *Allens* Case. In the Case of a Prohibition the party did Surmise, That the Lands were parcel of the Priory of *Cree-Church*, which came to the Crown by the Statute of *Dissolutions*, and that the Prior held them discharged of tythes at the time of the disso-

diſſolution, upon which Iſſue was joyned: It was moved in this Caſe, That there was not any diſcharge ſet forth, as by compoſition, unity of poſſeſſion, priviledge of order, *&c.* But it was the Opinion of the whole Court, That although that the ſpecial manner of the diſcharge was not ſet down in the pleading, yet the Court ought intend it to be a lawful diſcharge as compoſition, &c. for that the King ſhould hold as the Prior held, and it ought to be taken that it was a lawful diſcharge *tempore diſſolutionis.*

But ſuch Lands as came to the Crown by the Statute of 27 H. 8. of Diſſolution, ſhall at this day pay Tythes, although that the lands in the hands or occupation of the ſaid religious houſes were diſcharged from the payment of tythes; for that the priviledges being perſonal priviledges, were extinguiſhed by the ſaid Statute of *Diſſolution*; and there are no words in the ſaid Statute of 27 H. 8. to ſave the priviledges; and the Statute of 31 H. 8. being a ſubſequent Law, had no retroſpect to thoſe priviledges, and ſo it hath been adjudged in all

V. Sir *Marmaduke Strickland's* Caſe. 1639. at the Aſſiſes at *York* adjudged accordingly. *V. Claytons* Reports 117. And *v.* 12. Car. there adjudged acc. in another Caſe.

the Courts at *Westminster* by all the Judges of *England*, *viz.* 15 Jac. in Co. B. in *Garret* and *Wrights* Case, and 7 Car. in the Kings Bench in *Clark* and *Wards* Case.

Tythes then being meer Spiritual things, due *ex jure divino*, recoverable onely (as Tythes) in the Spiritual Court, and payable by all persons, unlesse discharged by prescription, suspension, priviledge or unity: Let us now see of what things Tythes shall be paid, and of what not; and what shall be a sufficient composition or *modus* paid in lieu of Tythes, and how long and how far such composition or *modus* shall bind the present Incumbent for the Tythes.

All Tythes are Prædial, Personal, or Mixt; Prædial Tythes are such as increase yearly of the ground, such as are Corn, Grain, Grass, Hopps, Saffron, Wood, Hemp, Flax and other profits arising meerly of the Ground; and these may be distinguished into *Decimæ Majores*, *& Decimæ Minores*, or *Minutæ Decimæ*; *Decimæ Majores* do belong to the Parson onely: But *Minutæ Decimæ*, such as Saffron, Wood, &c. do

do belong unto the Vicar, as hath been adjudged, Paſc. 38. Eliz. B. R. in *Beding* and *Feaks* Caſe: and Mic. 1. Car. in Co. B. in Sr. *Richard Udall* and the Vicar of *Attons* caſe. Perſonal Tythes, are thoſe that are paid of the profits of ſuch things as are gained by the Induſtry of Man. Mixt Tythes, are thoſe that are called Prædial Mediats, as Calves, Lambs, *&c.* which come not immediately of the ground, but proceed of things maintained out of the ground: of all theſe ſorts Tythes ſhall be paid, but with this *Proviſo* or Limitation, that the party who is to pay the ſame, have a property in them: For of things which are *feræ naturæ*, and of which a man hath not any abſolute property, or of things which are meerly for pleaſure, Tythes ſhall not be paid, and therefore of Apes, *&c.* Tythes ſhall not be paid.

Tythes ſhall be paid of Partridges and Pheaſants, but they are not Prædial, but perſonal; ſo it is of Conies taken in a Warren, and of Doves in a Dove-houſe.

If a man ſtealeth Connies out of a Warren

a Warren, or Doves out of a Dove-house, he shall not pay Tythes of them, because he is not the Lawfull Owner of them, and the Law gives him no propriety in them, and the Rightfull Owner of them, shall not pay Tythes of them, because he hath not the profit of them.

Hill. 16. Jac. in B. R. in a Prohibition between *Daudridge* and *Johnson* Parson of *Buckfield*: the case was, A. Parson libelled in the Eccleastical Court for Tythes of a Fulling-Milk, and suggested, that the Defendant the Miller fulled every week forty Cloathes, and did gain for every Cloth 2. s. wherefore he demanded the Tythes of them; In this Case a Prohibition was granted by the Court, for that by the Law of the Land he ought not to pay Tythes of them; nor were Tythes to be demanded of such Mills; For of such things as come only by the labour of Man Tythes are not payable, but of things renovant only.

Tythes shall not be paid, of Quarries of Stone, Tyle, Brick, Lyme, Gravel, Clay Chalk, so it was adjudged, Mic. 19. Eliz. in B. R. and Pasc.

Pasc. 34 Eliz. in Co. B. in *Liff* and *Watts* Case, for that these are parcel of the Inheritance, and the Parson or Vicar have Tythe of the Grass or Corn growing upon the same Lands, and the Land shall not pay a Double Tythe: and *vid.* 20. Eliz. by *Wray*, and all the Judges, that Coals are not Tytheable, and therefore that a Prescription *de non Decimando* of them is good.

Pasc. 34. Eliz. C. B. *Liff* and *Watts* Case. Cro. 2. p. 277. Register 55. Br. Dismes 18.

20. Eliz. B. R. by *Wray*.

Tythes shall not be paid of After-pasture where tythes have been paid before of the Grass of the same ground, unless that by covin there be left more Grass standing upon the ground with an intent to deceive the Parson, then there hath been wont to be left; and so was it holden Mic. 6. Jacobi in Co. B. in *Smiths* Case; and so it is of the rakings of Corn or Grain, as it was likewise adjudged Mic. 7. Jacobi in Co. B. for that by the Law of *Moses*, none ought to take their Grattens, but ought to leave them for the Poor and Orphans, and the Law will not give to the Parson or Vicar Tythe of that which is appointed for Almes.

Mic. 6. Jac. C. B. *Smiths* Case.

Mic. 7. Jac. C. B. adjudge.

Cook 2. part, Instit. 652. b.

Tythes shall be paid by the Inkeep-r

Tr. 16. Car. B. R. *Richardson* and *Cabels* Case. Paph. 143.

keeper of Pasture of his Guests Horses; But if the Innkeeper taketh a Cropp of Hey, & afterwards puts his Guests Horses into the grounds to pasture, Tythes shall not be paid: Trin. 16. Car. in B. R. *Richardson* and *Cabels* Case, adjudged accordingly.

Mic. 15. Car. in B. R. *Skyners* Case, adjudg acc.

Tythes shall not be paid of the Roots of a Coppice Wood grubbed up, but by Custome.

Pas. 7. Jac. in Co. B. adjudged acc.

If Lands lye fallow every second or third year, the same is a Charge to the Owner or Tenant for that year, and an Advantage to the Parson or Vicar in the bettering the Cropp the year when the same is sowed with Corn or Grain; and therefore although the Grass, and feeding of the Fallow ground be for that year some small profit to the Owner of the Soil, yet he shall not pay Tythe for the same: and therefore if barren Cattel be kept upon the Fallow, or upon the Stubble, no tythe is due for them: But if the Land be Tytheable, and the Tenant thereof will not plough or manure it, to prevent the Parson or Vicar of this Tythe which might arise of

of the ſame; it was holden by *Barkley* Juſtice, 15. Car. in the Kings Bench, that the Parſon might ſue the Tenant for Tythe of it in the Eccleſiaſtical Court: But *Quere* of it.

15. Car. in B. R. by *Barkley* Juſtice.

Tythes ſhall not be paid for beaſts of the Plow or Husbandry: But if a man keepeth Cattel upon his Grounds until they be ready for the pail, and afterwards ſelleth them, and makes profit of them, tythes ſhall be paid for them: Mic. 8. Jac. in Co. B. *Baxter* and *Hopes* caſe adjudged accordingly; and *vid.* 2. Car. in B. R. in *Pophams* Reports 197. where it is ſaid by *Whitlock* Juſtice, *De animalibus inutilibus*, the Parſon ſhall have the tenth of the Bargain for depaſturing, as Horſes, Oxen, *&c.* but *de animalibus utilibus*, he ſhall have the tenth *in ſpecie*, as Cows, Sheep, *&c.*

Mic. Jac. in Co. B. *Baxter* and *Hopes* caſe.

The Parſon of a Church libelled in the Spiritual Court for the tythes of a Riding Nag: the Caſe was this. A man let his Land, reſerving the running of a Horſe at ſome time when he had occaſion to uſe him there; It was ſaid by the Court in this

Tr. 15. Jac. in B.R. *Laurking* and *Wildes* caſe Paph. 126.

V. Tr. 9. Jac. in B.R. Pothill and Mayes case adjudged acc. *Bolstrod* 1. par. 171.

this Case, that nigh *London* a man will take a hundred or two hundred Horses to grass; and if he should not pay tythe for them, the Parson should be defrauded; But it was said, that if the Defendant did prove it was a Nagg for labour, and not for profit, then in such Case a Prohibition would lye, otherwise not.

If Underwood be imployed for the fencing of the Corn which is sowed upon the Land for the preserving of the pasture from spoyle by Cattel or otherwise, the Parson shall not have tythe of it, as it was adjudged, Hil. 15. Jac. in the Common Pleas, in *Hyde* and *Ellis* Case: and if there be a Parson and Vicar in one Church, and the Vicar hath tythe Wood, and the Parson hath the tythe of the Pastures, and Wood is Felled and Imployed in the making of the Fences, and for the Inclosure of the Pasture ground from the hurt of Cattel, there the Vicar shall not have tythe of the Wood which is felled for the same Inclosures, as it was holden also in the same Case.

Hill. 15. Jac. C. B. *Hyde* and *Ellis* case.

If Wood be cut down and imploye

imployed for Hoppoles, where the Parson or Vicar have tythe of the Hopps, they shall not have tythes of the Wood which is felled for the Hoppoles; as it was holden in *White* and *Bickerstaffs* Case, Mic. 15. Jac. in the Common Pleas: and it was there said by *Hobart* Chief Justice, that if a man hath a great Family, and much Wood is cut down and spent, and burnt in his house keeping, that tythes shall not be paid of such Wood.

Mic. 15. Jac. C. B. *White* and *Bickerstaffs* Case.

Trin. 4. Car in Co. B. in *Nortons* and *Farmors* Case, It was moved, to have a Prohibition for to stay a Suit in the Spiritual Court for tythe Wood, upon surmise that the Wood was spent in his house for firing, and shewed, that the Custome of the Parish is, that the Owner of any House and Land in the said Parish who pay tythes to the Parson, ought not to pay tythes for Wood spent for fewel in their houses; the issue being joyned, upon the Custom, it was found for the Defendant: It was moved in stay of Judgement, that although it be found that there is no such Custom, that they ought not

Tr. 4. Car. C. B. *Norton* and *Farmers* Case.

not to pay tythes for Wood ſpent in their houſes; yet *per legem terræ* they ought to be diſcharged of the ſame: But it was reſolved by the whole Court, that it is not *de jure per legem terræ*, that any be diſcharged of them. For it is uſual in Prohibitions to alledge Cuſtomes; Or by reaſon of other Lands whereof he payes tythes, that he is diſcharged of that kind of tythes, but not to alledge that *per legem terræ* he is to be diſcharged; and the Plaintiff in the Prohibition in this caſe having alledged a Cuſtom, the ſame being found againſt him, it was adjudged for the Defendant, and for that Cauſe only the Prohibition was denyed, and Conſultation awarded.

Mr. *Fitzherbert* in his *Natura Brevium* 53. is, that no tythe ſhall be paid for Agiſtment of Cattel: But now the Law is taken to be otherwiſe, and ſo was adjudged Mic. 38. Eliz. in Co. B. in *Gryſman* and *Lewes* Caſe: which ſee Cro. 3. part 44. and it ſhall be payd by the Owner of the Lands, and not by the Owner of the Cattel: and the reaſon thereof

is,

is, for that the Parson or Vicar may not know whose Cattle they are, and therefore the best shall be taken for the Church, and that which is most certain, and therefore the tythe for them shall be paid by the owner of the soil who agists the Cattle; and so it was agreed by *Foster* and *Cook* Chief Justice, in their argument of *Baxter* and *Hopes* Case, Mich. 8 Jac. in the Court of Common Pleas.

Mic. 8 Jac. in Co. B. *Baxter* and *Hopes* case.

If sheep dye after they be shorn, before the Feast of Easter next following, tythe shall not be paid of the Wooll of those sheep. 1. Because they are but of small or no value, & *de minimis non curat lex.* And, 2. Because that the owner of the sheep hath paid Tythe for them the same year, and there shall not be a double tythe paid for one thing in one year, as before is said. 3. Tythe shall be paid of the clear profit only, but if the sheep do dye before the Feast of Easter, all the profit of them is lost; and therefore for to demand tythes of them, were but *afflictionem addere afflicto.* And Tythes shall not be paid of the Pelts or Fells of sheep which dye of the rot without a spe-

cial custom so to do; and so it was adjudged, Trin. 3 Car. in the Kings Bench in a prohibition, betwixt *Ashton* and *Willer* Vicar of *Kilmousden* in the County of *Somerset*, where the Vicar libelled in the Spiritual Court for the Tythe Wooll of sheep which dyed of the rot, and a prohibition was awarded; But quere of the first of these Cases, for by Mr. *Fitzherbert* in his *Natura Brevium*, Consultation 51. g. The Parson by prescription may claim Tythe of Wooll of the sheep of the Parishioners, killed and dying from Mich. to the Feast of *Easter*, and may sue for the same in the Ecclesiastical Court: *ideo quere*; and shall have a consultation, if a prohibition in such Case be awarded.

A Custome was alledged to pay Tythe in kind for sheep if they continue in the Parish all the year, but if they be sold before shearing time, then to pay but *ob.* for every sheep so sold; it was in this Case holden by the whole Court to be a very unreasonable custom; for in such Case the Parson should be defeated of his Tythes. Pasch 17 Car. in Co. B. in *Weeden* and *Hardens* Case. See Mich. 2 Car.

2 Car. in B. R. in *Pophams* Reports, 197. acc.

Mich. 11 Jac. in C.B. *Sherringtons* Caſe. 2 Eliz. Dyer 170.

If ground be barren *ſuapte natura*, Tythes ſhall not be paid of it; but if ground be barren, and tythe wooll and lamb have been paid for the ſame by the ſpace of thirty years together, and afterwards by manurance and the labour of man the ſame is made fertile, and doth bear corn and grain, the owner of the Lands for ſeven years ſhall pay ſuch tythe for the ſame as he paid before: but if a Marſh or Meadow by accident, by inundation, or by ill husbandry, be over-run with thorns, buſhes, &c. yet the ſame is not barren ground, but the Parſon ſhall have tythe of it, as was holden Hill. 38 Eliz. in the Kings Bench in *Sherrington* and *Fleetwoods* Caſe.

Hill. 38 Eliz. B.R. *Sherrington's & Fleetwood's* Caſe. *V.* 15 Car. in B.R. *Sugden* and *Cottels* Caſe, acc.

Tythes ſhall be paid of Heath, Furs and Broom, unleſs the party ſetteth forth a preſcription or a ſpecial cuſtom not ſo to do, that time out of mind there hath been paid milk, calves, &c. for the Cattle that have been kept upon the ſame Lands; for then tythes ſhall not be paid of the Heath, Furs, or Broom; and ſo it was adjudged, Mich. 29 Eliz. in the Kings Bench.

Mic. 29 Eliz. in B.R. adjud.

11 H. 4. 89. 50 E. 3. 10.

Of Trees of the age of Twenty years growth or above, which are timber trees, tythes shall not be paid: but of *Sylva Cedua* and Underwoods, tythes shall be paid, but not of great Trees by the Statute of 45 E. 3. cap. 3.

Now what shall be said to be *Sylva Cedua*, and what timber trees, hath been a question, both by the Canon and Common Lawyers, *Linwood, l. 5. fol. 26. Decimæ de sylvis ceduis, ut de frumento persolvantur, circa quæ minus quam circa fructus agrorum laboris imponitur. Et ibidem declaramus provisione concilii sylvam ceduam illam fore quæ cujuscunque generis existens arborum in hoc habetur ut cedatur, & quæ etiam succisa ex stipitibus & radicibus renascitur.* And *Belknap* 50 E. 3. 10. In *sylva cedua* is included all manner of wood which is able to be cut, and which by good keeping may grow again.

The mis-interpretation of these words (*sylva cedua*) gave occasion to Parsons and Vicars in the time of King E. 3. to sue for tythes of great trees and timber trees under the name of *sylva cedua*: for the Declaration

and explanation of which the Statute of 45 E. 3. *cap.* 3. was made, by which it is ſaid, Whereas the great men and Commons ſell their woods at the age of twenty years, or of greater age, to Merchants, to their own profits, or in aid of the King in his Wars, Parſons and Vicars do implead them in the Spiritual Court for the Tythe of the ſaid woods by the name of *ſylva cedua*; it is ordained, That a prohibition in this Caſe ſhall be granted, as hath been uſed before this time.

Now 50 E. 3. 10. by *Belknap*, it was never ſeen, ſaith he, that of great trees or of timber trees, tythes were demanded; which the Court agreed; and by Cook 11 part, 48. in *Liſords* Caſe, The words in the Statute of 45 E. 3. and the Book 50 E. 3. *viz.* (great trees) muſt be intended, Aſh, Oak, Elm, of all which as well before the Statute of 45 E. 3. by the Common Law, as ſince, if they were of the age of twenty years growth, tythes was not to be paid, becauſe they of their nature were only accounted timber trees, and fit for building: but of Swallows, Willows, Maples, and the like, although that they be above

the age of twenty years, yet Tythes shall be paid.

Plow. Com. 450. Doct. and Stud. 196. Cook 11. part, *Lisords* Case acc.

It hath been a question, Whether Beeches are Timber-Trees, and whether Tythes shall be paid of them? But the better Opinion hath been, That they are not Timber-Trees, and that Tythes shall be paid of them, except where by the custom of the Country where there is scarcity of wood, they be accounted Timber Trees; for there no Tythes shall be paid of them; and so upon this difference it was adjudged, Pasc. 16 Jacobi in the Common Pleas in *Pinder* and *Spencers* Case.

If a great Wood doth consist for the most part of Underwoods which are tytheable, and some great Trees or Beeches grow here and there sparsim therein, Tythes shall be paid of the whole wood, unless they be especially excepted, as was adjudged, Trinit. 19 Jacobi in the Kings Bench: and so if the wood doth consist of the most part of Timber Trees, and there is some small parcel of Underwood or Bushes growing in the same Wood, the priviledge of the great wood and Timber Trees shall priviledge the residue of the Wood from Tythe to be paid

paid thereof, as it was ſaid by *Warbarton*, Juſtice, it was adjudged 16 Jac. in Co. B. in *Leonards* Caſe. 4 Eli. in B.R. *Foſter* & *Leonards* Caſe. Cro. B. part 1. acc.

If Timber Trees have been uſually topped and lopped, Tythes ſhall not be paid of the tops and loppings; for the Law that priviledgeth the body of the Tree, doth priviledge the branches of the ſame Tree; ſo if a timber Tree become *arida, ſicca, nec portans fructus, nec folia in æſtate, nec exiſtens Maremium*, yet becauſe ſometimes it was an Inheritance which was diſcharged of Tythes, although that now it become a dottard, Tythe ſhall not be paid of the ſame; for the quality remaineth, although the ſtate of the Tree be changed. Co. 11. part, 48. in *Liſords* Caſe. Cook 11. part, in *Bowles* caſe.

Tythes generally and originally are not payable of houſes for habitation, nor of any rent reſerved upon any demiſe of them; for tythes are to be paid of things which grow, or renew every year by the act of God: and for the houſes in *London* Tythes antiently were not paid; for the profits of the Churches in *London*, conſiſts only in Oblations, Obventions, and Offerings: But now by a Decree Cook 11. part, 16. D. *Graunts* Caſe.

made in the year 1535. and confirmed by Act of Parliament made 37 H. 8. cap. 12. the Parsons in *London* have 2 s. 9 d. in every pound of rent for the tythe of the house; but if a *Modus decimandi* be alledged to pay 12 d. in every pound of rent for every house in such a Parish in *London*, this is a good *Modus Decimandi*; for it may be, that for the Lands upon which the houses have been built, such a *Modus decimandi* time out of mind hath accustomed to have been paid.

Tr. 8 Car. in B. R. the Earl of *Desmonds* case adjudged acc. *V.* Cro. 1. part, 192. acc.

By the custom of the Realm Tythe shall be paid for Fish taken in the Sea, but the tenth Fish shall not be paid, but some small sum of money in consideration of a tythe: but if the Fish be taken in a pond, or in a several piscary, and not in the Sea, or any open River, then the owner shall pay tythe thereof as a Predial tythe was ought to be set forth within the Statute of 2 E. 6.

15 Car. in B. R. adjudged acc.

To pay a Buck or a Doe, or the shoulder of a Deere when a Deer is killed, may be a good *Modus decimandi* for the Tythe of a Park, as it was adjudged Mich. 5 Jac. in Co. B. and

Mich.

Mic. 11. Jac. in Cc. B. in *Cooper* and *Andrews* Case: and although afterwards the Park be disparked, and the land converted into tillage, or hopgrounds, yet the Parson shall not have tythes in kind, but the *modus* shall remain: so it is, if all the Park pale falleth down, which is a disparking in Law of the Park, yet the same doth not destroy the *modus*, for that the same may be a Park again; but *Quere* of this Case. For the difference hath been taken where the prescription goeth to so many acres of lands, and where to the Park by the name of a Park; for in the first Case the *modus* continueth, but not in the last if it be disparked; see to that purpose, Pasc. 19. Jacobi in the Common Pleas in *Poole* and *Reynolds* Case, where it was adjudged accordingly.

A prohibition was prayed upon a suit in the spiritual Court, for tythes in kinde of a Park now converted into tillage, upon surmise of a *modus decimandi* to pay a Buck or a Doe for all tythes, and the prohibition was granted; in which Case these points were resolved. 1. That although that

that they are *feræ naturæ*, yet they may be given for tythes. 2. Although they are not tytheable of themselves, yet they may be given for a *modus decimandi*. 3. That this is a discharge of the very suit, and the Park is not but a Liberty, and the owner may furnish it with game when he pleaseth: and so it was holden Hill. 6. Jac. in Co. B. in the Vicar of *Clares* Case: Vide *Sharp* and *Sharps* Case, Noy. 148.

13. Car. at the Assises at *York*, *Thursbies* case, V. *Claytons* Reports, 91.

In 13. Car. at the Assizes at *York*, *Thursbies* Case was this, *viz.* Suit was for tythes of Corn growing in a Park which was then disparked; the defendant did plead a custom to pay Venison and a Horse pasture time out of mind in satisfaction of all tythes, *&c.* Evidence was given that Corn had been sowed there and reaped, but no tythes paid; but the witnesses proved a Buck paid yearly, but could not tell whether it was out of this Park or not; the Jury found, if it was paid out of any Park, if it was accepted and allowed; it was the better to uphold the custom, then if particularly tyed to pay a Deer out of this Park; for now, if the Park be disparked,

parked, yet this payment of the Deer may be performed; otherwise it had been, if the custom had been to pay a Deer out of this Park only; for then by the destroying of that the custom had been gone also; in this Case it was holden by the Judges, although the Deer had been often, and for the most part paid out of this Park, yet this doth not alter the custom, if it may be paid out of any Park: and if the custom was to pay a shoulder of Venison generally, it may come out of any Park; but the Judges directed the Jury, that if they found the Deer was to come out of this Park which is now disparked, then to find a special verdict.

If a custom be alledged, that the Parson shall have but the tenth sheaf of Wheat for all the tythes of all manner of Corn and Grain, this is no good custom, as it was adjudged 38. Eliz. in the Common Pleas: so in the Case betwixt *Jucks* and Sir *Charles Candish*, Mic. 11. Jac. in Co. B. it was alledged, that the Owners of such a Farm had used time out of minde to take back thirty sheafs of the tythe Corn after the same was set forth, to

their

their own uſes; it was the opinion of all the Juſtices, that it ought to be alledged, that the Farm was a great Farm; for otherwiſe the cuſtom would not be good, for that it tended to the impoveriſhing of the Parſon or Vicar, in taking away of a good part of the profits.

In debt upon the Statute of 2. E. 6. A preſcription was made to pay one load of Hay for all Hay growing in ſuch a Cloſe; this preſcription was diſliked of by the Judges, as where payment of one penny is pleaded in ſatisfaction of 20 l. but upon the evidence, it was not proved that the load of Hay was paid conſtantly; but ſometimes money, ſometimes 5 s. ſometimes 6 s. as the parties could agree; the Jury found for the plaintiff againſt the preſcription, and it ſeemed to the Judges, that the preſcription ſhould not be good to pay a load of Hay, becauſe of the charge of the making of it, and alſo of the loading of it, if it was the uſage ſo to do: *v.* 13. Car. at the Aſſize of *York*, *Jackſons* Caſe, *Claytons* Reports 60. Caſe 103.

But if a man ſoweth his lands with Corn,

Corn, and afterwards the heir maketh a Compoſition with the Parſon or Vicar to have but the thirteenth Sheaf for his tythe, this was holden to be a good Compoſition, and ſhould bind the Parſon: and if afterwards the heir doth endow his Mother of the third part of the Lands, the Mother ſhall have benefit of this Compoſition, although that ſhe cometh in paramount to the ſame.

In 17. Car. in the Kings Bench, *Hitchcocks* Caſe was this: A. Vicar did Contract by theſe words, *viz.* (*Inter ſe convenerant*) with a Pariſhoner to pay ſo much for increaſe of Tythes, and dyed; His Succeſſor ſued in the Eccleſiaſtical Court for them: and in this Caſe a Prohibition was granted; For it was ſaid this was not a real Compoſition, although the Biſhop called it ſo, but a perſonal agreement only; and in this Caſe it was ſaid, that if it was a Real Contract, and made between Spiritual perſons, and only concerning Spiritual things, it was ſueable only at the Common Law, and ſhould not bind the Succeſſor.

Paſc. 17. Car. in B. R. *Hitchcocks* Caſe.

A

Pasc. 21. Jac. in B. R. *Snell* and *Bennets* Case.

A Parson did Covenant with A. his Executors and Assigns, that for 10. s. to him paid every year by A. his Executors or Assigns, that he, his Executors and Assigns should be quit of the tythes for such Lands during the life of the Parson. A. paid the Parson 10. s. which he accepted of. Afterwards A. made B. an Infant his Executor and died. Administration *durante minore ætate* of the Infant was Committed to another who leased the Lands at Will; the Parson libelled in the Spiritual Court against the Tenant at will for to have tythe in kind of the Lands; it was adjudged in this Case, that he should have a Prohibition, for that the Agreement and Composition did bind the Parson during his life; and although the Assignee could not sue the Parson upon the Contract; yet he should have a Prohibition to stay his Suit in the Ecclesiastical Court, and put the Parson for his remedy for the 10 s. upon the Contract; for he could not have tythes in kind, because of the Composition.

V. Pasc. 16 Jac. in B. R. *Fulder* and *Grissius* Case, acc.

Every *Modus Decimandi* is by Prescription, and is intended to have a Lawfull

Lawfull Commencement upon some agreement at the first made for valuable Consideration with the Parson or Vicar; and therefore although that tythes in kind hath been paid for twenty or thirty years together, yet the same shall not destroy the *Modus*: And *vid.* 44. Eliz. in B. R. in *Nowel* and *Hicks* Case: Cook 2. part Instit. 653. When a Custom doth Create an Inheritance, it cannot be waved or annulled by payment, or other matter in Paise, *vid.* acc. 15. E. 3. title Judgement 133. 14. E. 3. ibid. 155. And it was agreed in Doctor and Student, that if it were ordained by Law, that payment of tythes in kind should cease, and that every Curate should have assigned unto him such a portion of Land, Rent, or Annuity, as should be sufficient for him; Or that every Parishioner should give a certain sum of money for the maintenance of the Curate, that such a Law would be a good Law: And then if tythes may be so changed by a positive Law into Rent or Annuity, there is no question to be made, but a Composition made with the Parson or Vicar to pay

Mich. 6 Jac. in Co. B. *Middmans* and *Hintons* Case, adjudged, acc.

Mic 44. Eliz. B. R. *Nowel* and *Hicks* case, Co. 2. part, Instit. 653.

15. E. 3. Judgement 133. & 155.

8 H. 6. 22, 23.
9 H. 6. 17.
41 E. 3. 27.
17 E. 3. 11.
12 H. 4. 13.
19 H. 6. 75.
34 H. 6. 36.
31 H. 6. 28.
35 H. 6. 5.
26 H. 8. 7.
27 H. 8. 20.
& 21. &c.

pay a *Modus Decimandi* which hath continued time out of mind, Custom being equivalent to Law, is good and shall bind the Parson and his Successors: But a *Modus Decimandi* cannot begin at this day; but must be by Prescription: But yet at this day, a Composition may be made which shall bind during the life of him that made it, as it was agreed, Pasc. 17. Car. in *Hichcocks* Case above mentioned.

13 Car. in B. R. *Setons* case.

In an Action of Trespass a Prescription was layed, that 2. s. 9. d. had been paid for eleven Doles of Meadow; the Case was, That these eleven Doles were parcel taken out of a great Meadow; and the Witnesses did prove, that a third part had been paid for every Dole of the whole Meadow, of which the eleven Doles were parcel. In this Case, it was adjudged against the Plaintiff, because he laid his Prescription entire, and several thirds for every Dole, though it did amount to so much; and thereupon the Plaintiff was Nonsuit.

In a Prohibition a Prescription was suggested to pay a rate tythe of

13 s. 4 d. for all Land, &c. and for the profits of a Mill, upon Evidence, the Witneſſes proved ſeverall ſmall ſums paid, as 5 s. 2 s. &c. which in the whole came to the juſt ſumme in the Preſcription; this was holden to be no good proof of the Preſcription by the Owner of the Inheritance; But otherwiſe it had been, if theſe ſeveral ſummes had been paid by the ſeveral Tenants of ſeveral parcels of the Lands in queſtion; and in this Caſe it was holden, If ſuch a Preſcription is laid for an hundred Acres, and the Plaintiff faileth in the number, *Quere* if it be not a failer of the Preſcription; therefore it was conceived the beſt way to lay it was, That it had been paid for ſuch Cloſes, &c. by name. And it was further cleerly holden in this caſe, That there being no proof made which did extend to the Mill, that the Plaintiff did fail in his preſcription in all.

15 Car. Sir *Arthur Robinſons* Caſe, *Claytons* Reports, f. 31. Caſe 135.

The proper Court, for the Parſon or Vicar to ſue in for his Tythes not paid, or withholden from him by his Pariſhioners, or for the profits of his Church taken from him by

another Parson or Vicar, is the Ecclesiastical Court by a Libel there preferred against them, or by a Spoliation.

If one Parson taketh away the Tythes or profits belonging to the Church of another Parson: If the Tythes or profits do amount to a fourth part of the value of the Church, he shall have a Spoliation against him in the Spiritual Court, although they claim by several Patrons: and if they claim both by one Patron, there one shall have Spoliation against the other, although the profits do amount to above a fourth part, as to a third part, or the moyetie of the Church, because in that Case the Patronage doth not come in debate: But if the profits do amount to above a fourth part, and they claim by several Patrons, there if one Parson sueth a Spoliation against the other in the Spiritual Court, the party grieved (which is the Patron) shall have an *Indicavit* (which is in the Nature of a Prohibition) unto the Spiritual Court, because the right of the Patronage doth come in debate. But where the

38 H. 6. 20. by *Fortescue.*

26 H. 8. 3.

Right

Right of the Tythes doth only come in debate, and not the right of the Patronage, there the Spiritual Court shall have the Jurisdiction of it: and therefore in an Action of Trespasse brought by a Parson against a Vicar for underwood, and each of them did claim the Underwoods by Prescription as his Tythes, there although their claim was by Prescription (which was a matter tryable at the Common-Law); Yet because the Right of the Tythes was in debate only, the temporal Court was ousted of the Jurisdiction.

22 E. 4. 24. Mich. 29 Eliz. in B.R. adjudged acc. 35 H. 6. 39. acc.

Spratt Sub-Dean of *Exeter* did Libel in the Spiritual Court against *Nicholson* Parson of A. *pro annuali pentione* of 30 l. out of his Parsonage, and shewed in his Libel, how that *tam per realem compositionem, quam per antiquam & laudabilem consuetudinem, ipse & Prædecessores sui habuerunt & habere consueverunt prædictam annualem pentionem* out of his Parsonage of A. and in this Case it was adjudged, That although he claimed the same pension by Temporal grounds, *viz.* by Prescription and real Composition; yet because the parties were both Spiri-

Mich. 10 Jac. in Co. B. *Spratt* and *Nicholsons* Case.

tual persons, he had his Election to sue for the same either in the Spiritual Court, or in the Temporal Court. And the Statute of 34 H. 8. cap. 16. gives liberty to Spiritual persons to sue for pensions in the Spiritual Court: But if a Spiritual person who hath such a pension by prescription, bringeth a Writ of Annuity for the same (as he may do if he will) and declares upon the prescription, he cannot afterwards sue for this Annuity in the Spiritual Court, by the name of a pension; for that he hath determined his Election, and if he doth, a Prohibition will lye.

See 35 Eliz. in *Croker* and *Dormers* Case, in *Pophams* Reports 23. where it was holden by all the Justices, That a pension issuing out of a Rectory, is the same with a Rent: and that such a Pension was demandable by the Common Law, in the Common Law Court; and by that Case it appeareth, That such a pension was demanded in a Writ of Entry, whereupon a Common Recovery was had.

And so if a Parishioner shall refuse to

to pay his Tythes, or doth not set forth his prædial Tythes, the Parson may Libel against him in the Spiritual Court if he please; Or else at this day, the Parson or other Proprietor of the Tythes, may have their Action in the Kings Temporal Courts, for the not setting forth, or for the substraction of them at their Election, and shall recover the treble value of the Tythes, as it was adjudged by all the Judges of *England*, against the opinion of *Egerton* Lord-Keeper, 29 Eliz. in *Woods* Case. For although that the treble value be not given to the Parson or proprietor of the Tythes by any express words in the Statute of 2. E. 6. Yet forasmuch as he is the party grieved, and hath the right of the Tythes in him, the treble value is given to him. For whensoever a Statute giveth a forfeiture or a penalty against any one who wrongfully detaineth, or dispossesseth another of his Right or Interest, in that Case, he who hath the wrong, shall have the forfeiture or penalty, and shall have his Action at the Common Law for the same, or else he may sue in the

14 Cook 2 part. Instit. 650 b. Hill. 40 Eliz. in Co. B. 101. 699 *Bedells.* Case acc.

Eccleſiaſtical Court for the ſame cauſe.

In 17 Car. in the Common Pleas, the Caſe was this, A. Parſon Libelled in the Eccleſiaſtical Court for tythes, and ſet forth, That the Tythes were ſet forth, and that the Defendant did hinder and ſtop him to carry them away: It was holden by the Juſtices in that caſe, That becauſe he did not ſue upon the Statute, for he doth not mention the double value in his Libel as he ought to do, as was agreed by all the Juſtices, a Prohibition in that Caſe was awarded.

Now, what ſhall be ſaid a ſetting forth of the Tythes, and what not, appeareth by the Judgement given 10 Car. in *Anderſons* Caſe; where it was holden by all the Juſtices, That if a Pariſhioner ſetteth forth his Tythes, and they ſtand upon the Land two or three dayes, and afterwards he taketh and carrieth them away, that this is not a ſetting forth of the Tythes within the Statute of 2 E. 6.

Paſch. 15 Car. in the Kings Bench, In an Action brought upon the Statute of

of 2 E. 6. and found for the Plaintiff, it was moved in Arreſt of Judgment, becauſe the Plaintiff ſaid, That the Defendant was Occupier only, and did not ſhew what Intereſt he had; But it was the Opinion of the Juſtices and the whole Court, That he needs not ſo to do; for that whoſoever taketh away the Tythes is a Treſpaſſer: and an Action lyeth againſt a Diſſeiſor for the Tythes: and that if one cutteth them, and another carrieth them away, an Action lyeth againſt any of them.

If a Parſon or other Proprietor of the Tythes will ſue for the ſame in the Eccleſiaſtical Court, for the not ſetting forth, or the ſubſtraction of them, after they are ſet forth, he ſhall recover in that Court but the double value of the ſame; and the reaſon thereof is, becauſe in the Eccleſiaſtical Court he ſhall recover the Tythes themſelves; which makes it equivalent with the treble value at the Common Law, as it is ſaid in Cook 2. part, Inſtit. 651.

And therefore the Caſe was, Hill. 11 Jac. in the Court of Common-Pleas; Hill. 11 Jac. in Co. B. *Baldwin* and *Girryes* Caſe.

Eccleſiaſtical Court for the ſame cauſe.

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of 2 E. 6. and found for the Plaintiff, it was moved in Arrest of Judgment, because the Plaintiff said, That the Defendant was Occupier only, and did not shew what Interest he had; But it was the Opinion of the Justices and the whole Court, That he needs not so to do; for that whosoever taketh away the Tythes is a Trespasser: and an Action lyeth against a Disseisor for the Tythes: and that if one cutteth them, and another carrieth them away, an Action lyeth against any of them.

If a Parson or other Proprietor of the Tythes will sue for the same in the Ecclesiastical Court, for the not setting forth, or the substraction of them, after they are set forth, he shall recover in that Court but the double value of the same; and the reason thereof is, because in the Ecclesiastical Court he shall recover the Tythes themselves; which makes it equivalent with the treble value at the Common Law, as it is said in Cook 2. part, Instit. 651.

And therefore the Case was, Hill. 11 Jac. in the Court of Common-Pleas; Hill. 11 Jac. in Co. B. *Baldwin* and *Girryes* Case.

Pleas; That a Parson did Libel in the Spiritual Court for the substraction of tythes, and the defendant in the Court of Common Pleas suggested to be discharged of Tythes by priviledg within the Statute of 31 H. 8. and had a Prohibition: And Issue being joyned in the Court of Common Pleas upon the Priviledge, the plaintiff in the Prohibition was Nonsuit. Whereupon a Consultation was awarded, and a sentence was afterwards given for the Parson in the Spiritual Court, That he should recover the single value, and set the value certain; *Et ulterius quod recuperet duplicem valorem*, and set the same also certain. And after this sentence a Prohibition was awarded, because therein they exceeded the value which was to be recovered in their Court; And it was adjudged, That although their sentence was not, that he should recover the treble value; yet because Sentence did amount to so much being laid together, a special Prohibition was Awarded, setting forth the whole matter at large.

And a Parson shall have an Action upon the Statute of 2 E. 6. for the

the Treble Value, or may sue in the Spiritual Court for the double value at his Election, although he be no Parson at the time of the Action brought: For if a Parishioner doth not set forth his tythes, or substracteth them after they are set forth, and afterwards the Parson is deprived for Symonie, or other crime, and so declared by a sentence given in the Spiritual Court against him; yet may such a Parson after such his Deprivation sue in the Ecclesiastical Court for the substraction of the tythes which were due to him before his Deprivation, & a Prohibition will not lye, as it was adjudged, Hill. 13. Jacob. in *Coles* Case.

And thus much briefly of tythes, the profits of the Church or Parsonage belonging to the Incumbent; let us now come to speak somewhat of Churches Collegial and Parochial, either Presentative, or Donative; And how, where, and by whom an Union may be made of two Churches into one, and of the Appropriations of them, and of Advowsons.

CHAP.

CHAP. XXVIII.

Of Churches Cathedral, Collegiall and Parochial, Prefentative, or Donative; Of Visitation of them: Of Proxies incident to Visitations, and of the Union of Churches, and of the Appropriations of them, and Advowsons.

ALL Churches are Cathedral, Collegial and Conventual, or Parochial: A Cathedral Church is the See, or Church of the Bishop of the Dioceſs, whereof he is the Incumbent.

Dodd. 5. acc.

Coo. 11. p. 71.

Of every Cathedral Church there is a Dean and a Chapter, who are the Prebendaries or Canons thereof, who are of Council with the Bishop: But they have and hold their poſſeſſions ſevered and divided from the poſſeſſions of the Biſhop: The Viſitation of Cathedral Churches doth belong unto the Metropolitan of the Province, or elſe to the King, when the Temporalties of the Archbiſhop of the Province, *ſede vacante,*

17. Aſſ. 29. 40. E. 3. 28.

cante, are in the Kings hands.

Collegial Churches or Conventual, were such as in times past, were belonging to Abbies or Priories, and the like, and such as are at this day in Colledges.

A Parochial Church is that *Ad quam Ecclesiam Plebs convenit, ad percipienda Sacramenta Baptismatis & Corporis & Sanguinis Christi, unde pabulum ad animas sustentendas suscipiant*: of which the Parson, of whom we have before spoken at large, is Incumbent, who hath the Cure of all the Souls within the Parish.

In a Church Parochial, there are other Officers besides the Parson and Vicar, *viz.* the Church-wardens, Parish Clark *&c.* The Church-wardens are a Corporation, who have a capacity to take goods into the use of the Church; and the Government of the body of the Church doth appertain unto them; they shall have an Action of Trespass for taking away the Goods and the Ornaments of the Church in their own Names: and also shall have an Appeal of Robbery for the goods of the Church, which are stollen out of the Church: Cook 1. part, Instit. 3. 2. 13. H. 7. 10. a. 37. H. 6. 30. 3. E. 2. Iris. Kinc. Lib. Abridg. Ass. 76.

Church: and if they do recover damages in any Action brought by them as Church-wardens, the damages shall go to the use of the Church, and they shall not have them to their own uses. But the Church-wardens have not a Capacity to purchase Lands to the use of the Church: Nor is any Lease made by them of the Churches Lands good in Law.

8 E. 4. 6. 13 H. 7. 10. acc.

Cook 1. part, Instit. 3. 22 H. 7. 29.

The disposing and placing of the Parishioners in Seats in the Body of the Church doth appertain to the Ordinary *de communi jure*; and by appointment from, and under the Ordinary, to the Church wardens; and for a Seat in the Church, the Suit doth properly belong unto the Spiritual Court. But if a Custom be alledged, that the Church-wardens themselves in their own Rights time out of mind, without the power of the Ordinary, have used to have the placing of the Parishioners in Seats *Navi Ecclesiæ*, this is a good custom, and for such a Seat the Suit shall be at the Common Law, and not in the Ecclesiastical Court, because the Ecclesiastical Court cannot try the Custom, as it was adjudged 9. Car. in

in the Kings Bench, in *Tompsons* Case.

If a Gentleman with the consent of the Ordinary, hath built an Isle to the Chnrch, and set convenient Seats there for him and his Family, and hath alwayes repaired the same at his own costs and charges; if the Ordinary place another man in the Seat with him, without his consent, he may have his Action upon the Case against the Ordinary; But if with the consent of the Ordinary a man builds or sets a seat in *Navi Ecclesiæ*, and another mans pulls down the same, or defaceth it, an Action *Vi & armis* will not lye against him, because the Freehold of the Church is in the Parson; but in such Case, he may sue the party in the Spiritual Court for the wrong done unto him.

Mich. 10 Jac. in Co. B. Pym and *Garvens* Case.

The Church-wardens are at every Visitation of the Bishop of the Dioceſs to make presentment of all Misdemeanours and Offences in the Parson, Vicar, or Parishioners, either concerning Religion, or the breach of the Rites and Orders of the Church, and for to present the defaults of all that repair not to Divine Ser-

Service there, or observe not the Rites and Ceremonies of the Church: and although they have so large an Authority in the Parish under the Ordinary; yet they are not esteemed to be Ecclesiastical persons, but they are for the most part Lay-men, and they may be removed from their Offices by the Ordinary upon just cause of complaint made unto him, or else by the Parishioners themselvs; and therefore if a Parish doth pre-
16 H. 8. 5. b. scribe to have the choice of their Church-Wardens for two years together with the assent of the Parishioners, yet may the Parishioners themselves within two years remove such Church-wardens, and appoint others in their places; otherwise they might waste all the goods of the Church within the two years, for which the Parishioners could have no Remedy against them.

The Parish Clark is an Officer in the Church; but he is most commonly a Lay man, and no Ecclesiastical person, and his Office is but a Lay-Office; He is to be chosen by the Parishioners, and not by the Parson or Vicar alone, and he is also removeable

moveable upon Cauſe from his Office at their Wills and Pleaſures: He is not a perſon corporate, nor hath ſucceſſion, and the Parſon is not tyed to find the Pariſh Clark, as it was adjudged, Hil. 30. Eliz. in B. R. in *Saul* and *Woods* Caſe; But if the Parſon be tyed to find ſuch a Clark, A Preſcription to pay 5. s. *per an.* or ſuch ſumm to ſuch a Pariſh Clark by a Pariſhioner in diſcharge of his tythes, is a good diſcharge of the tythes againſt the Parſon: But yet tythes are not payable to him as tythes: And that he is but a Lay-perſon, and removeable as aforeſaid, appeareth by the Book of 3 E. 3. Annuity 40. where an Annuity was granted unto a man untill he was promoted unto a Benefice; and in a Writ of Annuity brought by the Grantee, the defendant did alledge, that the Plaintiff was made by him the Clark of ſuch a Pariſh Church; and it was ruled to be no good plea, to barr him of his Annuity: for that the Clark of a Pariſh was but a Lay-Officer, and he was removeable at the pleaſures of the Pariſhioners; and the Clarkſhip was no Benefice within

Hil. 30. Eliz. B. R. *Saul* and *Woods* caſe. Leon. 1. p. 94.

within the intent of the Grant. So likewise was it adjudged in the Case of a Prohibition; where the Parishioners of the Parish of St. *Alphage* in *Canterbury* did prescribe to have the Election of their Parish Clark, and by a Canon made 1 Jacob. the Election of the Clark was given to the Vicar: It was adjudged in this Case for the reasons before alledged, That the prescription should be preferred before the Canon; and so much the rather, because by the Prescription no more was claimed, then by the Law of the Realm was due and usual; and a Prohibition was awarded accordingly.

Pasch. 8 Jac. in Co. B. *Cundict* and *Plomers* Case.

Churches Collegial, Conventual or Parochial, were alwayes Visitable by the Bishop of the Diocess, if no special Exemption was made by the Founders of the Ordinaries Jurisdiction in the Visitation thereof. And so were all Abbies, Priories, and other Religious Houses; and the Bishops, or other Visitors had anciently Proxies allowed them for their Visitations, which was a certain Exhibition of Provision in *Esculentis & poculentis* in the time of their Visitations.

A

A Proxie is called *Procuratio*, and ought to be *secundum qualitatem personæ Visitantis, & substantiam Visitatorum.* But when the pomp of the Visitors did require such provisions as were intolerable both to Incumbents of Churches, and to Religious houses whereof they were the Visitors, every Church & Religious House was reasonably taxed; and the Proxies for Provisions were reduced into certain sums of monies, which were paid yearly into the Nature of Pensions to the Ordinaries who had the power to visit them.

Upon the Dissolution of Abbies and Monasteries, Proxies were not extinguished, although the Visitation did cease: neither were they extinguished by Unity of possession in the hands of the King, but suspended onely: And when the Abbies and Priories, and the Land out of which the Proxies were paid by Grants from the King, came unto Lay-men, then were those Proxies revived, and at this day they are due and payable out of all Impropriations unto the Ordinaries, although the Visitation doth cease; And all other Churches Pre-

sentative do at this day pay a certain summ of money to the Ordinary for a Proxy for his Visitation.

Proxies do agree with tythes in some things; for as the Instruction of the people in the Service of God, was the first Cause of payment of tythes: so Visitation which (as Mr. *Littleton* saith) doth alwayes accompany Instruction, was the first Cause of Proxies; and as no Layman can prescribe in *Non Decimando*, as before is said, so according to the Rule of the Canon Law, *Nulla est adversus Procurationem Præscriptio.*

But if a Parochial Church be Donative (as the same may be) and exempt from all Ordinaries Jurisdiction, there the Ordinary shall not visit the Church, but the Patron by Commissioners appointed by him; and there it seems Proxies shall not be paid; for that Proxies are Spiritual duties, which had their originall by the Canon Law, and were due only to Ordinaries and Ecclesiastical Visitors, and were recoverable only in the Ecclesiastical Court, and were not due or payable to Lay-

Lay-Patrons, or such their Visitors.

If the King doth Found a Church or Chappel, he may exempt the same from the Ordinaries Jurisdiction; and then the Lord Chancellor of *England*, or the Lord Keeper of the Great Seal for the time being, shall visit the same. 20 E. 3. Ex. commens. 9. 21 E. 3. 60.

And if the King by his Letters Patents do Licence a common person to found a Church or Chappel, exempt from the Ordinaries Jurisdiction, the same shall be Visited by the Founder, and not by the Ordinary. And if such a Clerk Donative be disturbed in his Incumbency, the Patron or Founder shall have a *Quare Impedit præsentare ad Ecclesiam*, and declare upon the special matter: But if the Patron of a Church Donative doth once present unto the Ordinary, and his Clark be Admitted and Instituted, it is now become presentable, and it shall never be Donative after, and then the Ordinary shall visit the same, and a Proxie shall be paid, and Lapse shall incurre to the Ordinary, as it shall do in all other Benefices presentable. 6 H. 7. 4. by Keble. 8 Ass. 29. F. N. B. 42. 10. Cook 1. part. Instit. 344. 22 H. 6. 26.

50 E. 3. 27.
40 E. 3. 28. a.

By the Common Law, if two Churches be so poor, and of so small Revenue that the Incumbents cannot live, and maintain their Charge out of the profits of them, the Ordinaries, Patrons and Incumbents may make a Consolidation or an Union of the two Churches into one, and then upon the Union, it must be appointed who shall present next after the Union, one of them, or both of them, or Joyntly, or severally by Turns; and upon such union and agreement made by Instruments, or Writings under the hands and seals of the Patrons, Ordinaries and Incumbents, each of the Patrons if he be disturbed, may have a *Quare Impedit Præsentare ad Ecclesiam*: and although by the union, the Incumbency of the one Church be lost and extinguished, yet the Patronage doth remain still in being; and therefore if an Annuity be granted out of the Church of D. and afterwards the Church of D. is united to the Church of S. if the Grantee doth release to the Patron of the Church of S. the Annuity is not thereby extinct; But a Release to the

Dr. & Stud. 116.

the Patron of the Church of D. will extinguish the Annuity.

Every Union must be made by the Ordinaries, with the Consent of the Patrons, by special words of *Unire*, *annectere*, *Consolidare*, or the like, and must be perpetual: For an union of a Church for life or years is not good.

It hath been some Question, whether at the Common Law, an Union might be made of one Church or Chappel to another Church or Chappel, without the Kings Licence or Consent. And I do conceive that it might be; For the union is the Act of the Ordinary; *Unio est actus Spiritualis*, and as one saith, *Munus Episcopale est unire, quia tota Diocesis est Cura Episcopi*: and the Licence of the King is not so necessary in the Case of union of one Church unto another, as the same is in the Appropriation of Churches, or Advowsons; and I find in our Books, that in Cases of Union, the Licence of the King is not pleaded, but it is said onely, that the union was made by the Patrons and Ordinaries, or *concurrentibus his qui in lege requiruntur*:

34 E. 3. Qu. Imp. 197.

12 H. 8. 8. by Eliot.

tur: In 11. H. 7. 9. the Chappel of *Wanborow* was united unto *Magdalen* Colledge in *Oxford*, and it was pleaded, that the Union was by the Patron and Ordinary, but it is not pleaded to be with the Licence of the King: And so in 9. Eliz. Dyer. 219. The Parish Churches of *Illesfield* and St. *Martins* in the County of *Southampton* were united by the Ordinaries, with the Consent of the Patrons, but it doth not appear that there was any Licence of the King.

It is certain, that no person can Found any Church, Chappel, or Colledge without the Kings Licence, as appeareth by the Case of 7 E. 6. Dyer 18. where Pope *Urban* at the request of the Baron of *Greystock* Founded a Colledge of a Master and six Priests, which was Certified in the Book of the First fruits by the name of *Rectorium & Collegium de Greystock*: yet because it was agreed, that the Pope could not found or incorporate a Colledge within this Realm, nor assign, nor Licence any to assign lands to the same, but the same must be done by

by the King himſelf; it was adjudged, That the Foundation was void; and although the Colledge had the Countenance of a Lawful Colledge and Foundation, yet it was no Colledge within the Statute of 1 E. 6. of Chauntreys.

But if one Church or Chappel be united unto another without the Kings Licence, yet the union is not void (as I conceive) for theſe cauſes; 1. The Parſon, Patron and Ordinary at the Common Law might have alienated the poſſeſſions of the Church, or have charged the ſame without the Kings Licence; *à fortiori*, they might unite two Churches in one; for that the King loſt nothing thereby. 2. If an Advowſon holden of a common perſon, be appropriated without the Kings Licence, it is no forfeiture of the Advowſon, but the King ſhall preſent upon the avoidance *Nomine diſtrictionis tantum*, untill a Fine be paid unto the King for the Alienation in *Mortmain* without Licence; but it doth not make void the Appropriation. If then in that caſe, the Appropriation be not avoided, *à fortiori* an union ſhall not be avoided,

21 E. 3. 5. by *Sherd.*

ed, which is less then an Appropriation, although it be without the Kings Licence. 3. The right of the King to present to the Church is onely for Lapse, which is but a Casual and a Collateral right; and therefore an union made without the King of two Churches into one, by the Common Law may be good, and stand good.

By the Statute of 37 H. 8. cap. 21. it is enacted, That whereas there are many poor Parishes within one mile of another, the tythes and revenues whereof are not sufficient to maintain the Curate, & for the maintenance of the Reparations, Ornaments and duties belonging to the Church, that an union or consolidation of two such Churches may be into one, with the consent of the Ordinaries, Lawfull Patrons and Incumbents by Writings under their hands and seals. In that Statute there is no mention made of the Licence of the King to be had, or that the union must be with his consent, which if the consent of the King had been necessary, I conceive the makers of that Law would not have omitted;

and

and the King doth not loſe any thing by ſuch union; For that all Tenths, and Firſt fruits of Churches or Chappels, united according to that Statute, are thereby ſaved and reſerved to the Crown.

Trinit. 9. Car. in the Common Pleas, in the caſe between Dr. *Rowlins* and Sir *Henry Yaxley* for the Church of *Bowthorpe* in the Counry of *Norfolk*, The Queſtion was, whether the ſaid Statute of 37. H. 8. did extend to a Church Parochial only, or to other Churches; and whether by that Statute a Parochial Church might be united to a Church Collegiate without the Kings Licence: I did not hear that the Queſtion was ever Reſolved, or that any Judgement was given in that caſe: and therefore I will not take upon me to determine it. But in all caſes of union of Churches, I conceive it to be the ſafeſt and ſureſt courſe to have and obtain the Kings Licence, or conſent, although that it be after ſuch union made; for that perhaps will be ſufficient: For ſo it was holden to be in the Caſe of 11. H. 7. 9. For there, after the union made, the King

King granted his pardon, which was holden to be a subsequent assent, and sufficient to make the union good: And so it was adjudged, Trin. 37. Eliz. in Co. Banco. in *Austin* and *Twines* case, that the Confirmation by the Kings Letters Patents, of an union made of the Parish Church of *Ashe* unto the Deanery of N. after the union made, was sufficient.

Now although that one Church or Chappel may be united unto another Church or Chappel both by the Common Law, and by the Statute of 37 H. 8. by the Patrons, Ordinaries and Incumbents, without the Licence precedent of the King, or his subsequent Assent: Yet there cannot be any appropriation made of any Church or Advowson, without the Kings special Licence first obtained. For that every appropriation is a Mortmain, and the Patronage of the Advowson is thereby lost and extinguished, and the person or Corporation to whom the appropriation is made, is become Parson impersonee.

Concerning appropriations of Churches

Churches or Advowsons: 1. Concerning the time when that appropriations first begun, it is very uncertain: yet I find in Doctor *Ridleys* Book of the View of the Civil Law, that the beginning of appropriations and discharge of Tythes, was after *Benedict* the Monk who was the first Institutor of the Order of Monks; and *vid.* Cook 12. part, where it is said, That the Saxon Kings appropriated eight Churches to the Monastery of *Crowland*, as appeareth also by *Ingulphus* who was Abbot there; and it will be a difficult thing at this day to find out when appropriations were first made.

The Abbot of *Sulby* held the Parsonage of *Lubbenham* in the County of *L.* to his own use, which as a Parsonage Impropriate came to King *Henry* the eighth by the Statute of 31 H. 8. of Dissolutions. The King *Anno* 37. of his Reign granted it in Fee-farm, under which grant the plaintiff claimed: the defendant obtained a Presentation from the Queen, and to destroy the appropriation, did shew the Original of it, with a condition, that a Vicarige should

Tr. 37. Eliz. in Ex. Chamber, *Crimes* and *Smiths* Case, Cook 12. p. 4.

should be perpetually endowed, which was in 22 E. 4. and alledged that there never was a Vicarige endowed; and therefore that the appropriation was void: But it was Resolved by the whole Court, that the Vicarige in respect of the long continuance thereof was endowed, and in this case it was further said, that it should be dangerous now to examine the original of appropriations of Parsonages, and endowment of Vicariges, for that the Originals of them in time will perish.

But now further concerning appropriations of Churches and Advowson, Observe these Rules and grounds of Law, and the cases proving the same; and 1. It is to be noted and observed, that no man can make any appropriation of any Church having Cure of souls, the same being a thing Ecclesiastical, and to be made to some Ecclesiastical person, or body politick, but he only that hath Ecclesiastical Jurisdiction: and therefore in all appropriations, the Instrument of the appropriation is by the Bishop or Ordinary, and runs in this, or the like form,

form, *viz. authoritate nostrâ Ordinariâ Ecclesiam Parochialem de B. &c. Priori, & Conventui, &c. annectimus, appropriamus, & unimus per præsentes*: But yet the King is such a Spiritual person, that he of himself may appropriate any Church or Advowson, because he hath the Ecclesiastical Jurisdiction and power in him. But no other person within the Realm, or without, but the King, or the Ordinary by Authority derived from the King, can make any appropriation; and therefore appropriations made by the Pope, or by Licence from and under the Pope, were never allowed of by our Law. 2. Every appropriation must be with the Licence of the King: otherwise it is not good: and the Licence must be to the Spiritual body, or person to whom the appropriation is to be made to take the same, and not to the Bishop to make the same.

Cook 5. par. in *Cawdries* case

An Advowson of a Prebend holden of the King was aliened to an Abbot and his Successors: and afterwards the King granted unto the Abbot and his Successors, That the Abbot and his Successors should hold

hold the Prebend in their own hands: yet because the first alienation was without Licence, the King did seize the Prebend notwithstanding his subsequent Grant: and that the same must be to the Spiritual Body, or person, appeareth by *Pridle* and *Nappers* case. Cook 11. p. 9. Where, upon the special verdict, it was found, that the King by his Letters Patents *Licentiam dedit Priori & Conventui, &c. Quod ipsi Ecclesiam Parochialem de B. appropriare, consolidare, & incorporare, &c. & eam sic appropriatam, consolidatam & incorporatam in proprias manus & usus retinere possint.* 3. The Licence to appropriate, is alwayes general, *Quod cedente, vel decedente Rectore, &c.* And therefore an appropriation made when the Church is full of an Incumbent, *viz.* as to say (that the Parson to whom the appropriation is to be after the Church shall become void, shall be Parson, and shall retain the Gleab and fruits thereof to his own use) or else when the same is void of an Incumbent. In 8. Eliz. Dyer 244. an appropriation was made by the King of a Parsonage to the Bishop of

of *Coventry* and *Lichfield*, when the Church was full of an Incumbent, and it was adjudged it was good, and that the Bishop had nothing in the Parsonage during the life of the Incumbent; and therefore a Lease made thereof by him to begin after such a time as the Parsonage should come to him or his Successors, was adjudged void. 4. Upon the appropriation of every Church, there must be a Vicar endowed, and a competent summ of money appointed yearly to be distributed to the poor.

In 18 H. 6. 21. in the Great case of Consultation which was argued in the Exchequer Chamber, it was the opinion of the then Master of the Rolls, that an Advowson could not be appropriate without a succession, although the Incumbent purchase the Advowson by Licence to hold to his own use; For if a Prior be seized of an Advowson to him and his heirs, and he purchaseth Licence of appropriation, and [illegible] he and his Successors shall hold [illegible] Advowson to their own use; yet the Advowson shall descend to his heirs; but

but in such case if he will have the appropriation good, it were best for to alien the Advowson, and to repurchase it to him and his successors, and then the appropriation will be good. Lastly, all appropriations have been usually to Corporations or persons Spiritual, and not to bodies politick consisting of meer Lay-men; But whether the same may be at this day to Lay-men or to Lay-Corporations, I will not take upon me to resolve: For it was lately a question depending in the Kings Bench: and (as I take it) not yet resolved, Whether the King since the Statute of 25 H. 8. may by his Letters Patents, appropriate a Church Parochial, which was before Presentative, to a Lay-Corporation, all the Members of the Corporation being but meer Lay-men.

Co. 5. p. 110. Co. 11. 11. Com. 500.

Tr. 9 Car. in B. R. *Alden and Tatsils Case.*

And thus much also briefly concerning Churches Parochial and Collegial, Presentative and Donative; and of the Union, Consolidation, and Appropriations of them, and Advowsons.

CHAP.

CHAP. XXIX.

Of the Power of the Ordinary, And of his Certificate of Loyalty, of Matrimony, Bastardy, Profession and Excommengement.

THe Power of the Ordinary is very great, both in the Judgeing and determining of Ecclesiastical matters and Causes, of which he hath Jurisdiction; as also in the Execution of some things incident to his Office or place of Ordination.

Now the general Causes Ecclesiastical, of which Ordinaries have Jurisdiction, are these, *viz.* Blasphemy, Apostacy from Christianity, Heresies, Schisms, Ordaining of Ministers, Institution of Clarks presented to Benefices, Celebration of Divine Service, The Causes of Loyalty, of Matrimony, Divorces, general Bastardy, the Right of Tythes, and of Substractions of them: Oblations,

Obventions, Dilapidations; Causes concerning the Reparation of Churches; Probate of Wills and Testiments, Administrations, and Accompts for the same. The Causes of Incests, Fornications, Adulteries, Solliciration of Chastity, Pensions, Appeals in Cases Ecclesiastical; the Conusans of all which Causes do properly belong to Ordinaries, to be heard and determined in their Ecclesiastical Courts: But of this general power of the Ordinary, there are many restrictions, as by several Cases after mentioned it will appear. And therefore, 1. Although the Ordinary may grant Administration of the goods of a person who dyeth Intestate: yet he cannot dispose of the Intestate goods before all the Debts of the Intestate be fully satisfied: And therefore the Case in 7. Eliz. in Dyer 252. was, an Action of Debt was brought against the Ordinary for the debt of the Intestate; It was the opinion of the Justices, that after notice given of the Debt unto the Ordinary,

ry, That the Ordinary cannot dispose of the goods of the Intestate, until he hath satisfied the debt for which the Action is brought against him.

2. If Administration be committed of the Intestates goods to one by force of the Statute of 21. H. 8. and the Administrator doth satisfie and pay all the Intestates Debts, and his Legacies; yet the Ordinary hath not power to dispose of the rest and residue of the Intestates goods, either to the children of the Intestate, or others; but that they shall remain to the Administrator within the Intention of the Statute of 21. H. 8. as it was adjudged in one *Barrows* case: which see Pasc. 19. Jac. in Co. B. in *Hobarts* Reports.

The Commissary of the Bishop of *London* granted Administration of ones goods who dyed Intestate by Word; The Administrator sold the goods and dyed: Administration *de Novo* was granted to another who sued for those goods; and the

Issue was, *Si Episcopus London commisit Administrationem*. It was doubted at the first, if the Administration granted by the Ordinary by word only was good or not; It was at last Resolved, that it was not good: *vid.* to that purpose, Mic. 13. Eliz. Dyer 294. 21. E. 4. 10. and Cook 9. part 41. in *Hensloes* case.

3. If the Ordinary doth demand of a Clark who is presented unto him to be Instituted into a Benefice with Cure, his Letters of Orders, or his Letters of Testimonial of his good behaviour, and the Clark doth not shew them unto him, but departeth: and thereupon afterwards the Ordinary doth refuse him, and presents another to the Church; in this case it is a Disturbance of the Ordinary, and a *Quare Impedit* will lye against him upon such a Disturbance; and the reason is, because the Statute doth not compell the Clark who is presented to him, either upon his Examination, or at any other time, to shew

to

to the Ordinary his Letters of Ordination, or his Letters of Teſtimonial of his good behaviour, as it was adjudged, Paſc. 33. Eliz. in Co. B. in *Palmer* and the Biſhop of *Peterborows* caſe.

I ſaid before, That of thoſe things or Cauſes which are meer Eccleſiaſtical, the Juriſdiction thereof belongeth unto the Ordinary, and he ſhall be the Judge thereof, and his Certificate as Judge ſhall bind the parties in the Kings Temporal Courts; And therefore if in Writs of Dower and other Writs brought in the Kings Temporal Courts, Iſſue be joyned upon *Ne unque accouple in Loyal Matrimony*, this being a Cauſe which is meer Eccleſiaſtical, the tryal thereof muſt be by the Biſhop or Ordinary upon an Inquiſition taken before him as Judge; which is after this manner, *viz.* The King firſt ſends his Writ to the Biſhop to make the Inquiry; For the Eccleſiaſtical Judge before he hath received the Kings Writ, may not of himſelf enquire of the

Loyaltie of the Matrimony: But after ſuch time as he hath received the Writ to make the Enquiry, he muſt not ſurceaſe for any Appeal or Inhibition, but muſt proceed untill he hath certified the Kings Courts thereof; and then when the Biſhop hath received the Kings Writ, he doth give Notice thereof unto the party who took exception to the matrimony, at his dwelling houſe, if he hath any within the Dioceſs, to ſpeak at a day prefixed by him againſt the Matrimony if he will, and after ſuch notice given, whether the party come or not, the Witneſſes of the Demandant to prove the Loyalty of the Matrimony, are taken, and admitted by the Biſhop, if no ſufficient Exception be taken to the Witneſſes. After the Depoſitions taken they are publiſhed, and certified into the Kings Court where the Iſſue was joyned, by Letters under the Seal of the Biſhop, the form of which Certificate you ſhall find to be after this manner, *viz.*

Breve

Breve Domini Regis præsentibus annexum omni qua decuit reverentia accepimus; virtute cujus Brevis, vobis certificamus, Quod omnibus & singulis in Brevi illo specificat. ritè & debitè juxta juris Ecclesiastici exigentiam observat. et vocatis ex ea parte vocandis diligentem & celerem fieri fecimus Inquisitionem de rei veritate de & super materiis in brevi content. Per quam lucul'nter & evidenter comperuimus & invenimus per legitimas Probationes, & alia in hac parte Canonice requisit. quod A. in brevi prædict. Nominat. apud B. in Com. N. in Diocesi N. D. in prædicto brevi similiter Nominato legitimo Matrimonio Copulata fuit. In cujus rei, &c.

By this Certificate it appeares, that the Ordinary must certifie the point in issue generally, *viz.* That *Copulata, vel non Copulata fuit in legitimo Matrimonio*, and must not make a special verdict of it, or expres the manner of the Marriage at large. And after such Certificate made, there shall be no Ap-

14 Eliz. Dyer 303. 313.

peal, but the same Certificate shall be a Barr, and conclude all parties for ever: and after such Certificate and Resummons of the Tenant in the Kings Temporal Court, Judgement shall be given for the plaintiff.

10 R. 2. Tryall 120. If a Writ of Dower be brought against the Bishop of N. and others by several *Præcipes*, and they plead that the Demandant *Ne unque fuit accouple en loyall Matrimony*: yet shall the Writ go to the same Bishop to certifie the Loyalty of Matrimony, and not unto the Metropolitan; For although the Bishop be a party to the Writ, and Defendant in the cause; yet because there are other parties and defendants besides himself who shall be bounden by his Certificate, it shall be presumed that the Bishop will do right; and therefore he himself shall be Judge of the Matrimony: But if the Bishop himself alone had been Defendant, and had pleaded such a plea to Issue, there he shall not try the Matrimony; for then

then he should be Judge in his own cause, which the Law will not suffer; and therefore the certificate shall be by the Metropolitan: But if in a Writ of Dower or other Writ, the Issue to be tryed be, Whether *Alice* the demandant was the Wife of I. S. or not, the same shall not be tryed by the certificate of the Bishop, but by a Jury at the Common Law. 39 E. 3. 15.

Bastardy is an Ecclesiastical Cause; and if generall Bastardy be pleaded in disability of the plaintiff, the same shall be tryed by the certificate of the Bishop, whether it be in a real or a personal action: But if it be pleaded, that the plaintiff was born at such a place before the Marriage was solemnized, *Et issint Barstard*, this a special Bastardy, and shall be tryed by a Jury at the Common Law, where the birth is alledged. Cook 8. part, the Abbot of *Strat. Marcellus* Case. 4 E. 4. 15. 38 E. 3. Lib. Ass. 24. 41 E. 3. 21. 1 H. 6. 3. acc.

Profession is another Spiritual thing, and tryable by the certificate of the Bishop: For so was Profession alledged in a Knight of the Or- 40 E. 3. 27. by *Belknap*.

21.E.3. Tryal 98. 2.R.3.4.contr. Order of St. *Johns* of *Jeruſalem* in *England*, tryed by the certificate of the Biſhop where the Profeſſion was alledged.

9.H.7.2. by *Huſſey*. In 9 H. 7. 2. by *Huſſey*, If a man plead Profeſſion in another man, which is traverſed, it ſhall be tryed by the Certificate of the Ordinary: But if he plead, that at the time of the making of ſuch a Deed, or the doing of ſuch a thing, that the party was profeſſed in ſome Order of Religion, the ſame ſhall be tryed by a Jury at the Common Law, becauſe the Profeſſion refers to a certain time: But if Profeſſion or Baſtardy, be alledged in a ſtranger who is no party to the Writ or Action brought, there the Profeſſion, or Baſtardy ſhall be tryed by a Jury at Law: For that if the tryal ſhould be by the Ordinary, and he make his certificate of the ſame, the ſame remains a Record for ever, and the ſame ſhould conclude and bind the party for ever: for that he cannot averr againſt it; which would be dangerous and prejudicial to him who

43.E.3.37.6. 33 E.3.Tryall 90.

who is a ſtranger to the Writ.

Admiſſion and Inſtitution are alſo Spiritual things, and ſhall be tryed by the certificate of the Biſhop; For Intitution is but the Letter of the Biſhop, of which a Jury cannot take notice. But Induction is a Temporal thing, and ſhall be tryed by a Jury at the Common Law.

22. H. 6. 27. & 28 6. 9. H. 5. 9. b. 22. H. 6. 28. 2. H. 4. 17. 12. H. 4. 11. 32. H. 6. 34. acc.

Excommunication is another Spiritual thing, and if it be pleaded in diſability of the party in the Temporal Court, the ſame muſt be certified thither by the Biſhop himſelf: For no man can certifie an Excommengement but only the Biſhop who is the immediate Officer to the Kings Temporal Court to that purpoſe: But if the Biſhop be *in remotis*, or (*ſede vacante*) an Excommengement certified by the Guardian of the Spiritualties is ſufficient. An Excommengement certified by the Commiſſary or Official of the Biſhop is not good at this day, although in antient times the ſame hath been allowed.

Cook 1. part. Inſtit. 134. 41. E. 3. 10. 12. E. 4. 15. 20. H. 6. 17. 20. E. 3. Excommeng. 20. 20. H. 6. 1. 8. H. 6. 3. acc. 11. H. 4. 64. in Debt. 7. E. 4. 14. acc.

If

16. E. 3. Excommeng. 4.

If the Pope, or any other having Forreign Authority do excommunicate any subject of the Realm of *England*, or the Dominions thereof, the same is no disability of his person; For that the Common Law dissallows of all Acts done by Forreign power in the disability of any subject within this Realm.

Dr. & Stud. 125. acc.

If a Bishop certifieth the Kings Temporal Courts, that another Bishop certified him that the party is Excommunicated in his Diocess, this certificate upon the certificate, or Report of another is not good nor allowed of in our Law: For the Bishop must certifie the party to be excommenge upon his own knowledge. But if a man be Excommunicate by the Commissary of the Bishop or his Official, the same being done in the Bishops right, and in his Court, is sufficient, although the same be not certified into the Kings Courts under the Seal of the Bishop.

33. E. 3. Excommeng. 29

9. H. 7. 21. 7. E. 4. 14. Cook. 8. p. in *Trollops* Case.

If a Bishop be a defendant in an Action brought against him, an Ex-

Excommengement of the plaintiff in that Action certified by him to have been in his own Court, is not allowed of to be pleaded in disability of the plaintiff: for that the Bishop shall not be a Judge in his own cause, and the Kings Temporal Courts shall intend the same to be in the same cause.

5. E. 3. 8. 16. E. 3. Excommeng. 109. 9. H. 7. 21.

FINIS.

UMI

AN

APPENDIX,

CONTAINING

The HEADS of all the

several Statutes made in the Reigns of King *Charles* the First, and King *Charles* the Second, relating to the Matters contained in the former Book, and other Things touching the same POINTS.

IN the Statute made 13 Car. 2. cap. 12. is an Explanation of a Clause contained in the Act of 17 Car. 1. cap. 11. touching the Repeal of a Branch of the Statute made 1 Eliz. cap. 2. viz. *It is declared, That neither the said Act, nor any thing therein contained, doth take away any ordinary Power or Authority from the Archbishops, Bishops, or persons there-*

in named; but that they may use all Ecclesiastical Jurisdiction as formerly in causes belonging to the same. With Proviso, That they may not tender or administer to any person whatsoever the Oath *Ex Officio*, or any other Oath, whereby such persons to whom the same is administred, may be charged or compelled to confess or accuse, or purge him or her self of any Criminal matter or thing whereby he or she may be liable to Censure or Punishment.

Agreeable to this was a Resolution by the whole Court in the Common-Pleas, in the Case of *Allan Ball*, where the Question was, How far the High Commissioners might extend their Authority? And it was resolved, They might not send a Pursuivant to arrest any person subject to their Jurisdiction, to answer any matter before them: But they ought to proceed according to Ecclesiastical Law by Citation. Which they may send by a Pursuivant, and upon default proceed to Excommunication, and then to have a *Capias Excommunicatum*; which Writ *de Excommunicato Capiendo* is preserved, and returnable by

the

the Statute of 5 Eliz. See *Raſt. tit. Accuſation.*

By the Statute made 16,17 Car. 1. 11. The Branch of the Statute of 1 Eliz. 1. which gave power by Commiſſion under the Great Seal to exerciſe Eccleſiaſtical Juriſdiction is Repealed, with addition, That no Eccleſiaſtical Judge, Officer or Miniſter of Juſtice ſhall award, impoſe or inflict any Pain, Penalty, Fine, Amerciament, Impriſonment or other corporal puniſhment upon any of the Kings Subjects, for any contempt, offence, matter or thing whatſoever, nor give any Oath to any Church-Warden, Side-man or other perſon, to preſent or confeſs any thing, or to accuſe him or her ſelf of any crime or offence, whereby they may be liable to any pain or puniſhment, in pain to forfeit treble damages to the party grieved, and 100 l. to the firſt proſecutor, to be recovered by Action of debt, &c. in which no Wager of Law, &c. ſhall be allowed. And further, No new Court which may have the like power that the High-Commiſſion pretended to have, ſhall be hereafter erected, but all ſuch Juriſdictions, and all

Acts, Sentences and Decrees made by colour thereof ſhall be utterly void and of none effect.

Simony is a Sufficient cauſe for Deprivation, and ſo it was adjudged in Doctor *Hutchinſons* caſe, Parſon of *Keyne* in Devonſhire, that if any ſhall receive or take money, fee, reward or other profit for any preſentation to a Benefice with Cure, although in truth he which is preſented be not knowing, yet the Preſentation, Admiſſion and Induction are void by expreſs words of the *Statute*, 31 H. 8. *cap.* 6. And the King ſhall have the Preſentation *hac vice*. But if the Preſentee be not cognizant of the Corruption, then he ſhall not be within the clauſe of Diſability in the ſame Statute. And this was reſolved by all the Juſtices in Fleetſtreet, *Mich.* 8. Jac.

A Parſon grants an Annuity with a *Nomine pœnæ*, the Succeſſor ſhall be charged with the *Nomine pœnæ* due in his Predeceſſors life, and not his Executors.

And if I.S. be Parſon of D. and land be given to I.S. Parſon and his Succeſſors, and to I.S. Clerk and his heirs, he

he is a Tenant in Common with himſelf.

The Parſon in regard of his continuall attendance upon that Sacred Function, is freed from all perſonall charges that may hinder him in his calling; for ſuch a one ſhall not be choſen Bayliff, Beadle, Reeve or other ſuch Officer, F. N. B. 175. nor be compelled to come to the Sheriffs Turn. *Marl.* c. 10. Nor to the Leetes of the King or other Lords for Lands annexed to their Churches. F. N. B. 160. c.

To the Parſon belongeth of common right (as our Books ſay) the tenth of all manner of yearly encreaſe, which we call Diſmes or Tythes, and therefore by a Leaſe of *Rectoria*, the Leſſee ſhall have the Tythes and offerings of the ſame Church, for they are incident unto it. 15. *H.* 7. 8.

And if a Parſon demiſe his Glebe to a Lay-man, he ſhall pay tythes, becauſe they are of common right. 32 *H.* 8. Br. Diſm. 17.

Every Parſon before he can be incumbent, muſt be preſented to the Ordinary who is to admit him, and there-

fore is allowed time to inquire of the Clerks ability: As if he be presented to the Bishop when he is ready to ride, who willeth him to come to him in three dayes to be examined, but if he come not then, nor within six moneths after, the Bishop may collate by Lapse: for there be many things to disable him from having the Benefice; As if he be criminous, insufficient or have not his Letters of Order, *&c.* And if a meer Layman be presented, admitted and instituted, and no sentence of deprivation or nullity given, the Ordinary cannot collate by Lapse, for till that time the Church is full to all intents.

When the Ordinary admitteth him to be able, that is called Admission; when he admitteth him to the charge, as to say to the Clerk, *Instituto te habere curam animarum*, that is Institution.

And then the Archdeacon is to put him in possession, by delivering the Ring of the Church-door unto him, and ringing of Bells, which is called an Induction; and that being done, the party becometh an Incumbent: Before

fore which Induction, there is no Poſſeſſion or Freehold in him of Glebe, houſe or Tythes: ſo as a rent granted by a Prebendary after Admiſſion and Inſtitution, and before induction, with confirmation of the Ordinary before Induction, and of Dean and Chapter, the day of Induction is void.

The Incumbent hath not the meere right in him of Land in the right of his Church: But the Fee-Simple is in abeyance, that is only in the remembrance, intendment and conſideration of Law; therefore he cannot diſcontinue, and every act which he doth with ſuch land may be avoided, when he ceaſeth to be Incumbent, except ſuch as are done by conſent of Patron and Ordinary, which bind for ever, *Lit.* 143. 12 *H.* 8. 7.

If the Church be void ſix moneths without preſenting, which is called a Lapſe, the Ordinary himſelf may collate, that is, appoint a clerk of his own; and if it be void ſix moneths after his time, then the Metropolitan; and ſix

moneths after his time the King may present: but all this is to be understood, If the Patron present not before them: But so long as the Church is void though it be two years after, the Patron may present, and the Ordinary or Metropolitan are bound to admit him. *Doct.* and *Stud. per Br. plen.* 15.

When one Church is not able to find the Cure, the Ordinary by consent of the Patrons may unite it, or make a consolidation of it to some other: And it seems that in this case, the consent of the King is not required, because here is no prejudice wrought to any; for if one man be Patron of both Churches, he shall have the Sole presentment: if there be severall Patrons, then they shall present by turn, and the King shall have the Lapse as before he should: Otherwise it is upon an appropriation, for that is an Amortisement, and therefore all must joyn in the making of it.

Observe, That *Annates*, *Primitiæ* and Firft-Fruits are all one, and were the value of every Spiritual Living

Living by the year, which the Pope claiming the diſpoſition of all Eccleſiaſtical Livings, reſerved to himſelf. And thoſe and Impropriations began about the time that *Polydore Virgil*, *Lib.* 8. *cap.* 2. ſaith. *Vide Concilium Viennenſe, quod Clemens quintus indixit pro Annatibus.* Theſe Firſt-Fruits were given to the Crown by the Statute of 26 H. 8. cap. 3.

Decima, That is, Tenths of Spiritualties were perpetual, and paid to the Pope till *Urban* gave them to *Richard* the Second, to ayd him againſt *Charles* King of *France* and others, who ſupported *Clement* the 7th againſt him.

Hill. 34 E. 1. Anno 1307. At a Parliament holden at *Carliſle*, great Complaint was made of Oppreſſions of Churches, in which Parliament, the King with the aſſent of his Barons levied payment of Firſt-Fruits, and writ to the Pope to that purpoſe; whereupon the Pope relinquiſhed his demands, and the Firſt-Fruits for two years were by that Parliament given to the King.

In

In the 17th year of King *Charles* the Second, cap. 3. at *Oxford*, was made an Act for Uniting Churches and Chappels in Town Corporate; which see: whereby it is declared, That it shall be lawful for the Bishop of the Dioceſs, Mayor, Bayliff, &c. of any City or Corporate Town, and the Patron or Patrons to unite two Churches or Chappels in any such City, Town, or the Liberties thereof; Provided such Union shall not be good, if the Churches so united exceed the sum of one hundred pounds *per annum*, unless the Parishioners desire otherwise, &c.

Usurpation is when the Church becomes full by the presentment of a wrong Patron, which is done by the Institution of the party presented; But against the King Induction onely doth it. Therefore at the Common Law in a *Quare Impedit*, Plenarty at the day of the Writ purchased is a good plea, though it be by Institution onely. And the Plenarty by six moneths (which barreth the right Patron

Patron of his *Quare Impedit* by the Statute of *Weſtm. 2. cap. 5.*) is accounted from that time between common perſons. So is it for the King when he preſenteth. And in theſe Caſes the Ordinary may certifie a Plenarty without making mention of any Induction, but of Admiſſion and Inſtitution onely; But againſt the King, Plenarty is accounted from the time of Induction, and not before. And if a Patron that holdeth of the King, preſent, and dye after admiſſion and inſtitution of his Clerk, and before Induction, the King ſhall preſent anew. Otherwiſe it is in the caſe of a common perſon. But Plenarty is no plea in a *Quare Impedit* againſt a perſon imperſonee, (that is, a Spiritual Body Politique, which being Patron, hath the Church appropriated in ſucceſſion, *viz.* to hold to their proper uſe without preſentation, inſtitution, or induction of any Incumbent) for his Plea muſt be, That the Church is full of his preſentment, which a perſon Imperſonee cannot ſay. Nor is Plenarty in a *Quare Impedit* or Dar-

rein

rein Preſentment, if the Writ be purchaſed within ſix moneths.

It hath been held, That for ſubſtraction of Tythes, where the treble value is forfeited, it muſt be ſued for at the Common Law; And ſo it was accordingly adjudged, Trin. 44 Eliz. in *Spratt* and *Heales* Caſe, which was thus, *Spratt* Libelled in the Spiritual Court againſt *Heale* for ſubſtraction of Tythes; The Defendant in the Spiritual Court averred, That he had divided the Tythes from the Nine parts: Then the Plaintiff made addition to the Libell (in nature of a Replication) That the Defendant divided the Tythes from the Nine parts *prorſus diffitetur*; adding, That preſently after the pretended diviſion, *in fraudem Legis*, he took and carried away the Tythes, and converted them to his own uſe: and thereupon the Plaintiff obtained Sentence in the Spiritual Court, and to recover the treble value according to the Statute, 2 E. 6. cap. 13. And thereupon *Heale* made a Surmiſe, That he had divided

divided his Tythes, and that the Plaintiff ought to ſue in the Spiritual Court for the double, and at the Common Law for the treble value. But it was reſolved by the whole Court, That the ſaid Diviſion mentioned in the Libell, was not any diviſion within the ſaid Statute of 2 E. 6. cap. 13. Secondly, it was reſolved, That the Plaintiff could not ſue in the Spiritual Court for the treble value, but for the double value he might.

The Act of 14 Car. 2. cap. 4. That ſettles the Liturgy of the Church of *England* as it now ſtands reformed, makes ſeveral new cauſes of deprivation.

As firſt, That every Parſon, Vicar, or other Miniſter in poſſeſſion of an Eccleſiaſtical Benefice, is enjoyned to read the ſaid Common Prayer, and afterwards to make the Declaration in the ſaid Act mentioned, upon penalty, there being no lawful impediment; and within one moneth after ſuch impediment removed, of being deprived *ipſo facto*, as if the perſon neglecting

neglecting or refusing so to do were dead.

2. All Parsons, Vicars and Ministers to be after presented or put into any Ecclesiastical Benefice, enjoyned to read the Common Prayer as aforesaid, and to make the aforesaid Declaration within two moneths after they shall be in actual possession upon the same penalty.

3. All Deans, Canons, Prebendaries, Masters, Fellowes of Colledges, &c. Parsons, Vicars, Lecturers, Schoo.-Masters, &c. enjoyned to take and subscribe another Declaration in the said Act mentioned, upon pain of Forfeiture and loss of their places as if dead.

4. Every Parson, Vicar, Curate and Lecturer after subscription made, shall procure a Certificate under the Hand and Seal of the Archbishop, Bishop or Ordinary of the Dioces, and publickly read the same, together with the said Declaration upon some Lords Day within three moneths then next following, in his Parish Church where

where he is to officiate in the presence of the Congregation there assembled, in the time of Divine Service, upon pain of being *ipso facto* and his place void as if dead.

5. Provided, That no Title of Lapse shall accrue by any avoidance or deprivation by this Act, but after six moneths after notice given by the Ordinary to the Patron, or such Sentence of Deprivation openly read in the Parish Church becoming void by this ACT.

And whereas there were or might be some impediments to the damage of several persons by the penalties of the forementioned Act, there was another Act made, 15 Car. 2. cap. 6. Stat. 3. for relief of such persons as by sickness or other impediments were disabled from subscribing the Declaration in the said former recited Act, and Explication of part of the said former Act.

And since that, by his Majesties late Gratious Declaration, there is a

kind of tacite ſuſpenſion of divers of theſe things, and a Toleration granted; as by the ſame will appear. *Ideo vide.*

In the 17th year of the Reign of King *Charles* the Firſt, An Act was made to take away or at leaſt abridge Eccleſiaſtical Juriſdiction; And indeed through the whole current of the late Times, that Act ſtood in force; but this was repealed by 13 Car. 2. cap. 12. by theſe words, viz. *It is Declared, That neither the ſaid Act, nor any thing therein contained, doth take away any ordinary power or authority from the Archbiſhops, Biſhops or perſons therein named, but that they may uſe all Eccleſiaſtical Juriſdiction as formerly in cauſes belonging to the ſame. Provided the ſaid Act do not give any other Juriſdiction to Archbiſhops, Biſhops, &c. then they had by Law before the Year 1639.*

Now what the Archbiſhops power was before 1639. we find reported at large by the Lord *Coke* in *Porter* and *Rocheſters* Caſe, *lib.* 13. *viz.* That the Archbiſhop of *Canterbury*, is reſtrained

ſtrained by 23 H. 8. cap. 9. to cite any one out of his own Dioceſs; and becauſe the Archbiſhop of *Canterbury* hath a peculiar Juriſdiction in *London*, for this cauſe it is ſaid in the Title, Preamble and Body of the Act, That when the Archbiſhop ſitting in his exempt peculiar in *London*, cites one dwelling in *Eſſex*, he cites him out of the Biſhop of *Londons* Dioceſs. So that the intention of that Act was to reduce the Archbiſhop to his proper Dioceſs, unleſs in five caſes.

1. For any ſpiritual offence or cauſe committed or omitted, contrary to right and Duty by the Biſhop, &c. which word (*omitted*) proves there ought to be a default in the Ordinary.

2. Except it be in caſe of Appeal and other Lawful cauſe where the party ſhall find himſelf grieved by the Ordinary after the matter there firſt begun.

3. In caſe the Biſhop or Ordinary

&c. dare not or will not convent the party to be sued before him.

4. In case the Bishop or Judge of the place within whose Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be party either directly or indirectly to the matter or cause of the same suit.

5. In case any Bishop or other inferior Judge under him, &c. make request to the Archbishop, Bishop, or other inferiour Ordinary or Judge, and that to be done in cases onely, where the Civil Law or Common-Law affirm, &c.

To conclude, This Act is but a Declaratory Law of the antient Canons, and a true Expositon of them. And that appears by the Canon, *Cap. Roman. in sext. de Appellationibus et Cap. de Competenti in sext.* And the said Act was so Expounded by all the Clergy of *England*, Anno 1. *Jac. Regis*, 1603. Canon 94.

In the laſt place, I will ſet down what Writs lye in all Caſes concerning Eccleſiaſtical matters or things relating thereto.

And firſt,

Quare Impedit is a Writ that lyes for him that hath purchaſed a Mannor with an Advowſon thereto belonging, againſt him that diſturbs him in the right of his Advowſon, by preſenting a Clerk thereto when the Church is void; and it differs from the Writ called a *Darreyne Preſentment*, *Aſsiſa ultimæ præſentationis*, becauſe that lyes where a man or his Anceſtors formerly preſented; and this for him that is Purchaſer himſelf, *F. N. B. fo.* 32. and *Reg. Orig. fo.* 30. And here Note, That where a man may have an Aſſiſe of Darrein Preſentment, he may have a *Quare Impedit*, but not *è contra*. *Vide* the New Book of Entries on this Writ.

Quare Incumbravit, is a Writ that lyes againſt the Biſhop, who within ſix moneths after the Vacation of a Benefice, conferreth it upon his

Clerk, while two others are contending in Law for the right of presenting. And here Note, The Writ alwayes lyes depending the Plea. *Old N. B. fo.* 30. *F. N. B. fo.* 48. and *Reg. Orig. fo.* 32.

Quare non permittat, is a Writ that lyes for him that has right to present for a Turn against the Proprietary, *Fleta, lib.* 5. *cap.* 6.

Quare non admisit, is a Writ that lyes against the Bishop refusing to admit his Clerk that hath recovered in a Plea of Advowson, *F. N. B. fo.* 47. and New Book of Entries in the same word.

Quod Clerici non Eligantur in Officio Ballivi, &c. is a Writ that lyes for a Clerk, which by reason of some Land he hath, is made or in doubt to be made Bayliff, Beadle, Reeve, or some such like Officer, *F. N. B. fo.* 175. and *Reg. Orig. fo.* 187.

Quod Clerici Beneficiati de Cancel. is a Writ to exempt a Clerk from contribution

tribution towards the Proctors of the Clergy in Parliament. *Reg. Orig. fol.* 261.

Quod nec Perſona nec Prebendarii, &c. is a Writ that lyes for Spiritual perſons that are diſtrained in their ſpiritual poſſeſſions for the payment of a Fifteenth with the reſt of the Pariſh. *Vide F.N.B. fol.* 176.

Juris Utrum, is a Writ that lyes for the Incumbent, whoſe Predeceſſor hath aliened his Lands or Tenements, the divers uſes of which, ſee in *F.N.B. fol.* 48.

Excommunicato capiendo, is a Writ directed to the Sheriff for the apprehenſion of him who ſtandeth obſtinately Excommunicated forty dayes; for ſuch a one not ſeeking Abſolution, hath or may have his Contempt certified into the Chancery, whence iſſueth this Writ, for the impriſoning him without Bail or Mainpriſe, untill he conform himſelf. *F.N.B. fol.* 62.

Excommunicato Deliberando; is a Writ to the Under-Sheriff, for the delivery

delivery of an Excommunicate perſon out of Priſon, upon Certificate of the Ordinary of his Conformity to the Juriſdiction Eccleſiaſtical. *F. N. B. fol. 63.*

Excommunicato Recipiendo, is a Writ whereby perſons Excommunicate being for their obſtinacy committed to Priſon, and unlawfully delivered thence before they have given Caution to obey the authority of the Church, are commanded to be ſought and laid again into Priſon. *Reg. Orig. fo. 67.*

There are ſome other Writs which might be here inſerted; but we ſuppoſe this ſufficient for this place.

FINIS.